84-6667

No. 84 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

v.

FRANK BLACKBURN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
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No. 84-3381

RONALD S. MONROE,

Petitioner-Appellant,

versus

84-6667

FRANK BLACKBURN, Warden,
Louisiana State Penitentiary, Angola,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 12/4/84, 5 Cir., 198_, _____F.2d___)

(January 14, 1985.)

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 27 FOR STAY OF THE MANDATE

REHG-6

QUESTIONS PRESENTED

This petition raises three important federal constitutional challenges to Louisiana's administration of its local statutes regarding administration of the death penalty in criminal cases.

As we show, in raising those challenges, petitioner has at all times proceeded in timely fashion in full compliance with all state and federal requirements as they affect state post-conviction remedies and federal habeas relief.

The three issues are as follows:

1. After finding that petitioner had exhausted his state remedies, the District Court held that the State's post-conviction suppression of material, exculpatory evidence that another man had confessed to the crime for which petitioner had been sentenced to death, violated petitioner's federal constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963). But, instead of directing petitioner's release from custody unless the State afforded him a new trial, the District Court determined that petitioner should seek to obtain a new trial from the very same state courts which had already denied him relief.

In affirming this result, the Fifth Circuit held that petitioner had failed to show that his right to a "fair trial" was prejudiced by the suppression of the evidence which created a reasonable doubt as to his guilt because the evidence was suppressed after trial.

In United States v. Agurs, 427 U.S. 97 (1976), this Court drew a sharp distinction between newly discovered

evidence suppressed by the State and newly discovered evidence obtained from a neutral source, holding that when a defendant proved that evidence had been suppressed by the State he should not be held to the usual standard applied to a motion for a new trial on the basis of newly discovered evidence, because this would denigrate the "special significance [of] the prosecutor's obligation to serve the cause of justice." 427 U.S. at 111.

Accordingly, this petition raises the following important question of federal constitutional law which should be decided by this Court:

Where the State unlawfully has suppressed material, exculpatory evidence after a petitioner's conviction, do the fundamental due process concerns embodied in Brady and Agurs require that the petitioner be afforded a new trial -- until now the invariable remedy for a prosecutional suppression of material, exculpatory evidence?

2. In Witherspoon v. Illinois, 391 U.S 510 (1968), this Court reserved the question of whether a defendant convicted by a "death qualified" jury might "establish that the jury was less than neutral with respect to guilt." 391 U.S. 520 n.18.

That is precisely what the petitioner proposed to establish in the District Court. However, the District Court rejected petitioner's claim without holding a hearing on the issue.

The Fifth Circuit, affirmed, having previously ruled that this contention did not state a federal constitutional claim. Spenkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S 976 (1979). The Eight

Circuit -- in a recent opinion recognizing the split in the circuits on this issue and urging this Court to grant certiorari -- has in fact granted habeas corpus relief on an identical claim based on similar evidence. Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), aff'd, No. 83-2113 (8th Cir. January 30, 1985) (en banc).

Accordingly, this petition raises the question of whether certiorari should be granted to resolve a conflict between the circuits on an issue of central importance to the administration of the capital punishment statutes in the several states which prescribe that penalty in criminal cases?

3. Petitioner was represented at trial by an attorney who, during the month in which petitioner's trial took place, tried two other capital cases, prepared for a third, and handled a full docket of felony cases. As a result, petitioner's attorney failed completely to investigate petitioner's case, presented an inadequate defense at the trial on the merits and at the sentencing stage, and argued to a Witherspoon qualified jury that the death penalty was immoral and should never be applied in any circumstances.

Accordingly, this petition raises the important question of whether the Fifth Circuit erred in upholding the denial of petitioner's claim that, in the circumstances of this case, he was denied the effective assistance of counsel?

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FRANK BLACKBURN, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Ronald S. Monroe respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit denying his federal constitutional challenges to the sentence of death imposed upon him by the State of Louisiana.

Petitioner is incarcerated in the Louisiana State Penitentiary at Angola, Louisiana pursuant to a judgment of conviction of murder in the first degree. His death sentence was stayed by the District Court for the Eastern District of Louisiana on January 4, 1984 and that stay of execution continues in effect.

OPINIONS BELOW

The report of the United States Magistrate recommending that the writ of habeas corpus be granted, filed on February 2, 1984, appears as Appendix A. The unreported opinion of the District Court for the Eastern District of Louisiana, granting petitioner's writ of habeas corpus, but

failing to order that he be given a new trial, filed on February 28, 1984, appears as Appendix B. The District Court's Order approving the Findings and Conclusions of the Magistrate, filed on February 15, 1984, appears as Appendix C. The District Court's denial of petitioner's motion to amend its judgment, issued orally on April 25, 1984, appears as Appendix D. The Fifth Circuit affirmed the District Court's order on December 4, 1984. Monroe v. Blackburn, 748 F.2d 958 (5th Cir. 1984). Its opinion appears as Appendix E. A timely motion for rehearing and for rehearing en banc was denied on January 14, 1985. The order is noted at 752 F.2d 646 (5th Cir. 1985).

JURISDICTION

The opinion of the Court of Appeals affirming the District Court's order was entered on December 4, 1984. The Court of Appeals denied a timely motion for rehearing and rehearing en banc in orders dated January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

2. Amendment VI to the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed; . . . and to have the Assistance of Counsel for his defense."

3. Amendment XIV, Section 1 to the Constitution of the United States provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Crime and the Conviction

In the early morning hours of September 10, 1977, an armed intruder murdered Lenora Collins in her New Orleans home by stabbing her repeatedly in the chest and neck. When the police came to arrest petitioner an hour later, they found him asleep in his bed next door, where he lived with his family.

The only evidence that linked Monroe to the crime was the identification by the victim's two preteenaged children, Joseph and Theodise. No physical evidence such as fingerprints, footprints, a murder weapon or blood samples linked Monroe to the crime.

On January 23, 1980, Monroe was convicted of the first degree murder of Collins and sentenced to death.[1/] In accordance with the standards laid down by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), the jury that convicted petitioner was selected through procedures that excluded venire members who expressed doubts about imposing the death penalty, or who stated with certainty that they

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1/ A previous conviction had been reversed on appeal. State v. Monroe, 266 So. 2d 1345 (La. 1978).

could not under any circumstances, recommend the death sentence.

The Suppression of Material, Exculpatory Evidence

It is undisputed that six months after petitioner's conviction, the New Orleans police were told by Michigan authorities that another man, George Stinson, the former husband of the deceased Lenora Collins, had confessed to the crime for which petitioner had been sentenced to die. It is equally undisputed that the New Orleans police violated petitioner's constitutional rights by suppressing that information.

The basic facts concerning this suppression are as follows:

In July 1980, George Stinson murdered his common law wife Erma Jean Lofton, in Pontiac, Michigan by stabbing her repeatedly.

While investigating Stinson's murder of Lofton, Detective Joseph Gallardo of the Pontiac, Michigan Police Department received information that Stinson had confressed to the stabbing of his previous wife - Lenora Collins - three years earlier in New Orleans.

Detective Gallardo thereafter contacted the New Orleans Police Department to convey this information to Louisiana authorities. He spoke to Sergeant John McKenzie.

Sergeant McKenzie made detailed and contemporaneous notes of his conversation with Gallardo. These notes -- in no uncertain terms -- demonstrate the highly material and exculpatory nature of the evidence Gallardo conveyed. They state in pertinent part:

> While in jail Stinson got to bragging about how he had murdered his wife in Michigan to cell mate.
>
> Stinson also bragged that he had killed his first wife in New Orleans on 9/10/77 and threatened his step-children into identifying neighbor as killer . . . .
>
> Det. Gallardo also got information from a second source that Stinson had killed New Orleans wife Collins.

It is undisputed that the state never disclosed to Monroe or his counsel the information Detective Gallardo conveyed to Sergeant McKenzie, namely, that another man, a former husband of Lenora Collins, had confessed to the crime for which Monroe was convicted and sentenced to die. Monroe's counsel learned of the Stinson material and its suppression by the State only late in 1983, and then only by a fluke.

Post-Conviction Proceedings in the State Courts

On December 27, 1983, after his direct appeal was denied, State v. Monroe, 426 So. 2d. 867 (La. 1983), petitioner filed a motion in the New Orleans Criminal District Court seeking a new trial or in the alternative, post-conviction relief, and a stay of the execution then scheduled for just after midnight on January 4, 1984.

The motion explicitly raised each of the three constitutional challenges to the validity of his conviction which petitioner has set forth in this petition.

With regard to the claim that the State had unconstitutionally suppressed material, exculpatory evidence, all of the facts concerning that suppression which were later presented to the District Court in Monroe's federal habeas petition were presented to the state court, except for the McKenzie notes. Defense counsel were unaware of these notes

because they were still buried in the files of the New Orleans Police Department.

On January 3, 1984, the state court, after refusing to hold an evidentiary hearing on any of Monroe's claims, or to sign subpoenas for out-of-state witnesses to substantiate his Brady claim, dismissed the proceedings and denied the motion for a stay of execution. That ruling was affirmed by the Louisiana Supreme Court later that evening.

The Federal Habeas Petition

On December 30, 1983, Monroe filed a petition for habeas corpus in the District Court for the Eastern District of Louisiana, challenging the constitutionality of his conviction and sentence. He raised each of the three federal constitutional challenges set forth in this petition.

The District Court, after giving considerable deference to the proceedings in the state courts, stayed Monroe's execution on January 4, 1984, only eight hours before it was scheduled to take place. It did so after explicitly finding that Monroe had exhausted his state court remedies. The District Court ordered that a hearing be held before a United States Magistrate to determine whether material, exculpatory information had been withheld from Monroe in violation of the Brady rule. The District Court, however, refused to hold any evidentiary hearing on petitioner's other claims, and summarily dismissed them in an opinion dictated from the bench.

The Hearing Before the Magistrate

Only in response to Monroe's subpoena duces tecum issued in connection with the evidentiary hearing in the

District Court did the State in mid-January 1984 produce the McKenzie notes to defense counsel. For a period of some three weeks before, while the prosecution and defense counsel were litigating in both the state and federal courts over the Brady issue, the prosecution never bothered to check the official New Orleans Police Department file on the Collins murder where the McKenzie notes sat untouched. The State -- which had objected in state court to Monroe's request for discovery and an evidentiary hearing -- had let Monroe come within eight hours of execution without looking at its own files.[2/]

A full and fair evidentiary hearing, as ordered by the District Court, was held before Magistrate Marcel Livaudais on January 30, 1984.[3/] Three days after the hearing, Magistrate Livaudais, after finding that petitioner had exhausted his state remedies, determined that Monroe's Brady claim had merit and recommended that a writ of habeas corpus be granted. (Appendix A.) After hearing all the evidence, including the testimony of George Stinson, the magistrate found that the evidence adduced at the hearing indicated "a parallelism between the Michigan and New Orleans murders":

> In each Stinson was the husband, in each a possible motive may have been the wife's apparent disaffection,

---

2/ If the prosecution did examine those files prior to the issuance of the subpoena duces tecum, its conduct is even more outrageous.

3/ Stinson and Gallardo both testified at the hearing before Magistrate Livaudais. Three New Orleans police detectives also testified at the hearing, and the deposition of Sergeant McKenzie was introduced into the record.

> in each a stabbing and in each a suggestion of witness intimidation.

(Appendix A at 8-9.)

He concluded that the State had suppressed material, exculpatory evidence in violation of Monroe's constitutional rights since, "evaluated in the context of the entire record," the Stinson confession "creates a reasonable doubt [as to Monroe's guilt] that did not otherwise exist." In the magistrate's words,

> It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime for which he has been convicted coupled with a suggestion of a second source of information in support.

(Appendix A at 8.)

The District Court's Review

On February 15, 1984, the District Court accepted the Magistrate's findings and conclusions and granted a writ of habeas corpus. In a "Memorandum Opinion" of February 29, 1984, the District Court, on a de novo review of the record, adopted the Magistrate's report as its own findings and conclusions. (Appendix B.) In finding that the suppressed evidence created "a reasonable doubt as to Monroe's guilt that did not otherwise exist" (Appendix B at 6), the District Court made at least three crucial points: (i) that no physical evidence linked Monroe to the murder, (ii) that testimony in the trial record "makes the assertion that Stinson committed the murder plausible," and (iii) that the only evidence directly linking Monroe to the murder -- "the eyewitness testimony of the victim's two children" -- is marked by "disturbing" aspects.

> Although this testimony would seem to clearly establish Monroe's guilt, the Court is disturbed by many aspects

> of their testimony . . . Detective Gallardo's testimony, at the evidentiary [hearing] concerning the facts surrounding the allegation that Stinson intimidated witnesses in Michigan as well as the Bridges testimony concerning the possibility that the children may have been coerced, supports the Court's concern that the children's testimony should be weighed against the exculpatory evidence . . . .

(Appendix B at 5-6.)

The District Court affirmed the Magistrate's finding that the suppressed new evidence created "a reasonable doubt as to Monroe's guilt that did not previously exist":

> The Court's reading of the record reveals there was no sign of a forced entry into the Collins' home. This, coupled with the fact that no murder weapon or blood stained clothing or rags were found at or around Monroe's home, indicate that Monroe may not have committed the murder. The record also reveals that Monroe's mother testified that on the day of the murder Stinson came by the Collins' home and tried to see his ex-common law wife. After he was told that she was not at home he said that he would come back that evening. This evidence makes the assertion that Stinson committed the murder plausible.

(Appendix B at 5.)

But, having found a Brady violation and granted a writ of habeas corpus, the District Court failed to order the invariable remedy for a Brady violation -- petitioner's release from custody unless the State granted him a new trial. Instead, the court remitted Monroe to the Louisiana courts to obtain whatever post-conviction relief those courts might afford him. The District Court made clear that it had "not ordered the State court to have another hearing," (Appendix D at 4) but left unclear precisely what the state courts were supposed to do.

On February 15, 1984, petitioner moved the District Court to amend its judgment insofar as it failed to direct Monroe's release from custody unless the State afforded him a

new trial. After oral argument on April 25, 1984, the District Court denied the motion from the bench, but granted a certificate of probable cause. (Appendix D.)

The District Court expressed the opinion that a state-court motion for a new trial is the only remedy for a Brady violation that occurs after a conviction is obtained. (See Appendix D at 14.)

The Fifth Circuit Decision

The Fifth Circuit affirmed the District Court's ruling, holding that "Monroe has failed to show that his right to a fair trial was prejudiced by the post-conviction suppression of evidence." 748 F.2d at 960.

It added "there is no possibility that Monroe's rights will be prejudiced," since "all of the information will be considered" in "an additional state hearing . . . ." Id.

The Fifth Circuit also affirmed the District Court's denial of the other federal constitutional challenges to petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE COURTS BELOW CORRECTLY RULED THAT THE STATE'S SUPPRESSION OF EXCULPATORY EVIDENCE, IN VIOLATION OF BRADY V. MARYLAND, DOES NOT REQUIRE THE STATE EITHER TO GRANT PETITIONER A NEW TRIAL OR RELEASE HIM FROM CUSTODY

The precise issue in this case has never been addressed by this Court: what is the proper federal constitutional remedy where a court has determined that, after petitioner's conviction, the State has unlawfully suppressed evidence that creates a reasonable doubt as to petitioner's guilt. The courts below have held that the State violated petitioner's due process rights under Brady v. Maryland, 373 U.S. 83 (1963), and that the suppressed evidence tended to show that Monroe is innocent of the crime for which he is condemned to die. Nevertheless, the lower courts have remitted petitioner to the state court, which has already refused to grant relief on this precise claim.

In all other cases, the invariable remedy for a Brady violation has been a new trial. Petitioner has not found a single case in which a new trial has not been granted in circumstances similar to this case, nor has the State cited any in the proceedings below. But for one fact -- the post-conviction setting of the illegal suppression -- a new trial undoubtedly would have been ordered here. Indeed, the District Court stated that at first it was "tempted" to order the State to grant a new trial. (Appendix D at 10.)

The District Court and the Court of Appeals did not grant a new trial because those courts adopted a myopic and

narrow view of what the right to a "fair trial" means in terms of the prosecution's obligation to see that justice is done. Under the lower courts' interpretation of Brady, a trial is fair if the State does not suppress evidence until after the defendant is convicted. Thus, as soon as the conviction has been obtained, the defendant's Brady rights diminish significantly -- or are even extinguished. Even if a petitioner can convince a federal court -- as this petitioner has -- that the state has suppressed material, exculpatory evidence, his only relief will be a second opportunity to present the same claims to a state court which has already denied him relief.

The fact that the evidence was suppressed after, rather than before or during, trial does not lessen the fundamental unfairness to petitioner inherent in such suppression, diminish the prosecutor's duty to disclose such material, or alter the finding that petitioner may be innocent. The practical effect of enforcing a lesser remedy for post-conviction Brady violations is grimly evident in this case: presumably the state court can refuse to grant petitioner a new trial and order that his execution be carried out, despite the undisputed and undisturbed findings of the federal courts below that the suppressed evidence creates a reasonable doubt as to petitioner's guilt.

The decisions below misinterpret and pervert Brady and Agurs. The Brady rule applies with equal force in the state and federal courts. The federal courts have already made the determination, both on the facts and law, that Monroe's constitutional rights were violated by the unlawful suppression of evidence which creates a reasonable doubt as

to his guilt. In those circumstances, the state may not constitutionally enter judgment on the conviction, since the Constitution invalidates any conviction based upon evidence that does not demonstrate guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 309 (1979). Hence, can there be doubt that if the future state proceedings ordered below resulted in any outcome other than a new trial, that the federal courts, upon a renewed petition for habeas corpus, would be constrained to grant one?

Further proceedings in the state court would be wholly improper for another reason. The doctrines of collateral estoppel and res judicata preclude the prosecution from religitating factual issues and legal conclusions that have already been determined by the federal courts. See, e.g., Stoll v. Gottlieb, 305 U.S. 165, 170 (1938); Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924). In an era when the federal courts have expressed concern about the efforts of state prisoners to proliferate federal habeas corpus proceedings, it is anomalous, to say the least, for a federal court to give the State a second opportunity to relitigate its factual and legal claims.

The District Court's remedy merely provides the state court with an opportunity to issue a ruling that is inconsistent with that of the federal court. Thus, the result would be exactly what the District Court hoped to avoid -- inconsistent rulings that strain the desired harmonious relations between state and federal courts.

Furthermore, the notion that Monroe should be remitted to the state courts so that they may adjudicate his new trial motion by state law standards directly contravenes

this Court's precedent. The Brady principle is bottomed on the fundamental unfairness of prosecutorial suppression of exculpatory evidence, see United States v. Agurs, 427 U.S. 97, 110-111 (1976). Accordingly, to effectuate the Brady rule, this Court has fashioned a federal constitutional standard for determining when a defendant is entitled to a new trial after prosecutorial suppression of exculpatory evidence. Thus, the Court has drawn a sharp distinction between newly-discovered evidence suppressed by the state and newly-discovered evidence obtained from a neutral source:

> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Agurs, supra, 427 U.S. at 111. That rationale applies just as strongly to post-conviction suppression as to any other Brady violation. The Fifth Circuit simply ignored this aspect of the Agurs decision.

This issue is of extraordinary public importance. If, in a post-conviction setting, a defendant's only remedy is a state court motion for a new trial to be judged by state law standards, instead of the Brady-Agurs federal constitutional standard, the prosecution has no incentive to uphold its obligations in the post-conviction setting. United States v. Agurs, supra, 427 U.S. at 111. In fact, the ruling actually encourages the prosecutor to suppress exculpatory evidence. If the suppression succeeds, the conviction and sentence -- perhaps a death sentence -- will stand. If the suppression fails, the prosecutor is no worse off -- a

defendant is left with the same remedy he would have had if the state had not suppressed.

Clearly, the Brady-Agurs standard should apply so as to discourage prosecutorial misconduct after trial, just as it discourages prosecutorial misconduct before and during trial. The sovereign's "overwhelming interest that justice shall be done," United States v. Agurs, supra, 427 U.S. at 111, does not end with the trial. In re Wright, 282 F. Supp. 999 (W.D. Ark. 1968) (granting new trial on basis of prosecutor's post-trial suppression of exculpatory evidence).

In fact, after trial, when a defendant's rights may no longer be vigilantly protected by watchful defense counsel in the adversary process, the burden on the state to ensure that justice be done is even greater. The Court should hold that the Brady-Agurs rule applies at whatever stage of the legal process the unlawful suppression of evidence occurs.

Contrary to the ruling of the Fifth Circuit, the rulings below are prejudicial to petitioner in the most fundamental sense. If the state has suppressed evidence which creates a reasonable doubt as to his guilt -- and the federal courts below have so found -- there is no reason why he should now be required to engage in further extended post-conviction proceedings in the state courts to obtain the new trial to which he is clearly entitled.

II.

THIS COURT SHOULD GRANT THE WRIT TO SETTLE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE ISSUE WHETHER A "DEATH-QUALIFIED" JURY IS PREDISPOSED TO FAVOR THE PROSECUTION ON THE ISSUE OF GUILT AND IS UNREPRESENTATIVE OF THE COMMUNITY AS A WHOLE

As we noted, the jury that convicted petitioner was selected through procedures that exclude venire members who express doubts about imposing the death penalty, or who state with certainty that they could not, under any circumstances, recommend the death sentence. This systematic exclusion of a sizable and distinct group denied petitioner his right to a fair and impartial jury by significantly reducing the possibility that the jury would be a representative cross-section of the community on the issue of guilt. This resulted in a jury that was conviction-prone and biased in favor of the prosecution.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that it was permissible to exclude from the sentencing phase of a capital trial those jurors who made "unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ." Id. at 522 n.21 (emphasis in original). But the Court left for another day the issue of whether such a jury would be fair and impartial with respect to the determination of guilt or innocence. The Court specifically stated, "a defendant convicted by such a jury in some future case might still attempt to establish that the

jury was less than neutral with respect to guilt." Id. at 517-518, 520 n.18.

That is precisely what petitioner proposed to establish before the District Court. However, the District Court rejected petitioner's claim without holding a hearing on the issue. The Fifth Circuit affirmed the District Court. Monroe v. Blackburn, supra, 748 F.2d at 961. The Fifth Circuit had previously rejected this claim in Spenkellink v. Wainwright, stating that even if the factual basis for the claim were true, there would be no violation of the federal constitution. Spenkellink v. Wainwright, 578 F.2d 582, 593-96 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

Since the Fifth Circuit's ruling in this case, however, the Eighth Circuit has held, on the basis of statistical studies substantially identical to the ones offered below, that Witherspoon-qualified jurors are prosecution-prone on issues of fact, in violation of the Sixth and Fourteenth Amendments. Grigsby v. Mabry, No. 83-2113 (8th Cir. January 30, 1985) (en banc). The Eighth Circuit has also held that its Grigsby ruling is to be applied retroactively. Woodward v. Sargent, 753 F.2d 694 (8th Cir. 1985).

Thus, there is a direct conflict in the circuits on this issue. See also McCleskey v. Zant, 753 F.2d 877, 901 (11th Cir. 1985) (rejecting claim); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984) (same). As Justice Marshall recently noted:

> This Court will certainly grant certiorari to resolve the issue in the immediate future because it presents a clear split in the courts of appeals on an issue of constitutional law whose importance to the administration of the States' criminal justice system is undoubted.

Witt v. Wainwright, 53 U.S.L.W. 3647, 3648 (March 5, 1985) (Marshall, J., dissenting). See also Knighton v. Maggio, 105 S. Ct. 32, 32-33 (1984) (Brennan, J., dissenting); Woodward v. Hutchins, 104 S. Ct. 752, 754-55 (1984) (Brennan, J., dissenting).

There is no significant distinction between the record in this case and that in Grigsby. Petitioner introduced in the District Court a complete transcript of the testimony in Grigsby, 569 F. Supp. 1273 (E.D. Ark. 1983), aff'd, No. 83-2113 (8th Cir. January 30, 1985) (en banc). Petitioner also introduced into the record below the affidavit of Edward J. Bronson, whose testimony was relied on by the court in Grigsby, along with several studies that are relevant to this issue. Professor Bronson was present in New Orleans and would have been called by Monroe as an expert witness had the District Court permitted the taking of testimony. After reviewing the voir dire in this case in the context of the relevant sociological literature, Professor Bronson concluded as follows:

> I have concluded that Mr. Monroe was prejudiced in this case by adverse effects on the representativeness of the jury caused by death qualification and its tendency to lead to a greater proneness toward convictions and recommendations of death. To summarize briefly, it is clear from the voir dire transcript that the jury in this case was not representative of a fair cross-section of the community, inasmuch as a distinct and cognizable group was excluded from the jury, namely, those who expressed strong opposition to the death penalty, including those prospective jurors who stated that they could be fair and impartial on the question of guilt despite their opposition to the death penalty.

(Document 32 of the Record on Appeal, Affidavit of Edward J. Bronson ("Bronson Aff.") ¶ 8.)

The evidence proffered here is substantially identical to that before the Grigsby court; indeed the

testimony in that case is part of the present record. Unlike the petitioner in Witt v. Wainwright, supra, petitioner in this case did not raise the juror bias issue as an afterthought or in a successive petition. The issue was raised in petitioner's initial petition in both state and federal courts, and petitioner made every effort to present to the District Court the evidence recently relied upon by the Eighth Circuit in Grigsby. This Court should therefore grant the petition and resolve the conflict among the Circuits.

III.

THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL EVEN THOUGH HIS ATTORNEY WAS SO OVER-OVERBURDENED THAT HE FAILED ALTOGETHER TO INVESTIGATE FAVORABLE EVIDENCE

Petitioner was represented at trial by an attorney who was so overburdened that he could not possibly have rendered the effective assistance of counsel required by the Constitution. During January 1980, when petitioner's trial took place, his counsel, John Lawrence, tried two other capital cases and prepared for a third, all in addition to a full docket of non-capital felony cases. As Lawrence has put it, trying three capital cases in four weeks "damned near killed me." (Document 1A of Record on Appeal, Affidavit of John Lawrence ("Lawrence Aff."), annexed to Monroe's Petition for Habeas Corpus.)

As a direct result, Lawrence's preparation for the sentencing phase of the trial was simply inadequate. Lawrence made no independent effort to collect and present favorable information about Monroe's character and background. If he had conducted even the simplest investigation, he would have found numerous witnesses who would have testified -- independently and consistently -- to Monroe's nonviolent character, gentle disposition, generosity, and conern for family and friends.

Instead of developing and presenting evidence such as this, Lawrence made only a single argument during the penalty phase: the death penalty should never be inflicted under any circumstances. Thus he turned the penalty phase into a philosophical debate that he was foredeoomed to lose,

for any venire member who shared this view had been excluded from the jury for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). Indeed, the Fifth Circuit recognized "that there was very little reason to expect an anti-capital punishment argument to persuade a Witherspoon-qualified jury." 748 F.2d at 962. But the Court of Appeals nonetheless held that Lawrence "made a reasonable choice with the evidence available to him." Id. That conclusion was wrong.

In light of the persuasive evidence readily available to him, Lawrence's performance was woefully inadequate, falling far short of the minimum standard required by this Court's rulings in Strickland v. Washington, 104 S. Ct. 2052 (1984) and United States v. Cronic, 104 S. Ct. 2039 (1984). Whatever else can be said about that standard, it means at least this: due process entitles a capital defendant to something more than one-third of a lawyer.

The time pressures on petitioner's counsel prevented him from doing even a rudimentary investigation of petitioner's case. By his own testimony, Lawrence had to rely primarily on the transcript from the first trial, and assume that little additional evidence was available. Thus Lawrence did not even visit the community where the crime took place, nor did he interview potential witnesses who may have known about another person's involvement in the crime. (Lawrence Aff. ¶ 8.)

Lawrence failed to investigate or present evidence supporting the one theory that would have cast doubt on the State's case. He never explored the possibility that George Stinson murdered Lenora Collins, even though he knew of that

possibility. As the present record shows, that line of investigation would have been promising indeed. But Lawrence failed to pursue it -- not as a tactical matter, but simply because he did not have the time to develop this all-important information. As a result, Monroe was sentenced to death.

This Court has recognized that in some instances the circumstances surrounding the representation of a defendant may be so prejudicial that no lawyer, even a fully competent one, could be expected to provide effective assistance. United States v. Cronic, supra, 104 S. Ct. at 2047. However, the Court did not specify what those circumstances are that make a defendant's representation constitutionally defective. Cronic was a non-capital case in which the defendant relied mainly on the allegation that his counsel was young, inexperienced, and given only 25 days to prepare for trial. The Court found that the representation provided to the defendant was sufficient under the Sixth Amendment.

In this case, however, the circumstances are much more grave: petitioner's life was a stake and, in preparing his defense, his attorney had only enough time to read a transcript of petitioner's previous trial. Because he was unaware of the salient facts of petitioner's case, Lawrence "failed to function in any meaningful sense as the Government's adversary." Id. at 2051.

This Court should grant the writ to determine whether counsel in a capital case is constitutionally ineffective if he (a) fails to make a meaningful plea at the penalty phase, based on evidence relating to his client's particular circumstances, for the defendant's life and

(b) fails, simply because of time pressures, to investigate the defendant's only viable defense as to guilt.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 15, 1985

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE — CIVIL ACTION

versus — NO. 83-6277

ROSS MAGGIO, Warden, ET AL — SECTION: F/5

FINDINGS AND CONCLCUSIONS

Petitioner, Ronald S. Monroe, is a state prisoner presently incarcerated in the Louisiana State Penitentiary at Angola, Louisiana. He was convicted of first degree murder of Lenora Collins on January 26, 1978 and on that same date the jury recommended the death sentence. The Supreme Court of Louisiana reversed the conviction and sentence on December 15, 1978. State v. Monroe, 366 So.2d 1345 (La. 1978). On January 23, 1980 petitioner was retried on the same charge, convicted, and again the jury recommended the death penalty. The court sentenced petitioner on February 6, 1980 to death by electrocution. The Louisiana Supreme Court affirmed the conviction and sentence on April 6, 1981. State v. Monroe, 397 So.2d 1258 (La. 1981), rehearing denied.

Petitioner's execution was scheduled for January 5, 1984 at 12:01 a.m. He applied to this Court for a writ of habeas corpus and for post-conviction relief pursuant to 28 U.S.C. §2254 on December 30, 1983. Previously, petitioner sought post-conviction relief, a new trial and a stay of execution in the Criminal District Court, Parish of Orleans. On December 29, 1983 the request for the stay was denied. The request for a new trial,

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for a continuance on motion for a new trial, and for a stay of execution was denied on January 3, 1984 by the Criminal District Court in Orleans Parish. This Court denied petitioner's application for a stay of execution on January 3, 1984. The Louisiana Supreme Court denied petitioner's application for post-conviction relief and for a stay of execution on January 3, 1984. Monroe v. Maggio, ___ So.2d ___, No. 83-KP-2651 (La. January 3, 1984). Thus, petitioner has exhausted his state remedies. Minor v. Lucas, 697 F.2d 697 (5th Cir. 1983); Rose v.Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982).

The matter was heard on January 4, 1984 and this court considered several grounds alleged by petitioner in support of his application for a stay and for post-conviction relief. The Court granted the petitioner's stay until February 7, 1984 on the basis of ground two of petitioner's application to permit an evidentiary hearing to review the validity of petitioner's claim of a denial of due process. The Court specifically found that all other grounds of petitioner's application lacked merit. (Record Document 12 at 14).

An evidentiary hearing was held on January 30, 1984 to consider the merits of the second ground alleged in this petition for habeas corpus. (Record Document 1 at 7). Ground two raises the issue of whether petitioner's Sixth Amendment rights were violated by the State's suppression of evidence which was allegedly exculpatory in nature and which could have indicated that

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petitioner is not guilty of the crime for which he was convicted and sentenced to death. The petitioner argues that he was denied due process of law under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1964) because the State failed to relay to defense counsel the fact that a Michigan police detective informed the New Orleans Police Department of the possible confession of another man to the crime for which petitioner has been convicted.

The prosecution's suppression of evidence when it has been requested by the accused, if the evidence is favorable to him and is material to his guilt or his punishment, violates due process whether or not the prosecution is in good faith or bad faith. Brady, 83 S.Ct. at 1196-1197. If the defendant makes a general request for all exculpatory evidence or makes no request at all for evidence, the prosecutor violates his constitutional duty to disclose if "his omission is of sufficient significance to result in the denial of defendant's right to a fair trial." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976).

The prosecution is not required to supply the defense with "a complete and detailed accounting ... of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972). Undisclosed evidence is not material if it is only possible that it might have helped the defense or affected the outcome of the trial. Agurs, 96 S.Ct. at 2400. Omitted evidence is material and its suppression violates due process if

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it creates a reasonable doubt that did not otherwise exist when it is considered in light of the entire record. Id. at 2402. If reasonable doubt about defendant's guilt does not exist with or without evaluation of the ommitted evidence, a new trial should not be granted. However, if the additional evidence, even if it is of relatively minor importance, creates a reasonable doubt, the evidence is material and the prosecution's suppression of it amounts to constitutional error. Id.; Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981).

Further, the fact that the prosecuting attorney is not shown to have knowledge of the exculpatory evidence does not neutralize the nondisclosure. "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld." The police department is part of the prosecution; the state has the duty to disclose and the fact that the police had not informed the prosecuting attorney does not excuse the nondisclosure of material exculpatory evidence under Brady. Barbee v. Warden Maryland Penitentiary, 331 F.2d 842, 846 (5th Cir. 1964).

The State must prove the defendant's guilt beyond a reasonable doubt in order to convict him. Jackson v. Virginia, 443 U.S. 307, 309 (1979). In order to determine if the "cmitted evidence creates a reasonable doubt that did not otherwise exist," the court must "evaluate all the evidence as it would bear on the deliberations of a factfinder." Cannon v. State of Alabama,

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558 F.2d 1211, 1213-1214 (5th Cir. 1977). See Agurs, 427 U.S. 112, 96 S.Ct. at 2401.

As aforesaid, petitioner was convicted in January, 1980. In Louisiana a motion for a new trial based on discovery of new and material evidence may be filed within one year after verdict. LSA-C.Cr.P. Art. 851(3), 853. Evidence adduced at the hearing before the undersigned established that in July, 1980, Detective Joseph W. Gallardo of the Pontiac, Michigan Police Department contacted the New Orleans Police Department and told them that in the course of investigating one George Stinson's murder of his common-law wife in Michigan, he had received information that Stinson may have also murdered his previous wife, Lenora Collins, three years earlier in New Orleans. On September 23, 1980, he again telephoned the New Orleans Police Department and spoke to Sergeant John McKenzie, platoon commander of the homicide division of the New Orleans Police Department. Gallardo told McKenzie of a tape recorded interview (Plaintiff Exhibit 2) he had had with Francis Lee McWilliams,[1] Stinson's cellmate in the Oakland County Jail, where Stinson had been incarcerated after his arrest for Lofton's murder.

During the interview, McWilliams related several conversations he had had with Stinson, during which Stinson first confessed

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[1] McWilliams had been transported to New Orleans to testify at the hearing but was not called by either party.

to stabbing Lofton, and then stated that "the same thing happened" to his first wife -- Leonora Collins. Detective Gallardo also reported information he had received that Stinson had threatened Collins' two children -- Joseph and Theodise [2] -- into identifying Monroe as their mother's killer.

Sergeant McKenzie scribbled notes of his conversation with Gallardo, and then after verifying the existence of a New Orleans case file wrote a three page summary in more legible and chronological order. (Defendant Exhibit 1, testimony of McKenzie, at 12,13). Petitioner contends that this three page summary made on September 23, 1980 (Plaintiff Exhibit 5) constituted Brady material which was not made available to him until produced earlier in these proceedings. Sergeant McKenzie explained that the top and center portions of page one of the summary was information he gleaned from the New Orleans case file, the bottom portion of page one and all of page two was information given him by Detective Gallardo and that page three constituted notes of his follow up after the telephone call. (Defendant Exhibit 1 at 18). He placed the information in the pigeonhole mailbox of the detectives in charge of the case. (Defendant Exhibit 1 at 52-53). The detectives did not recall receiving the information. The summary was located in the case file and produced by counsel

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[2] The eyewitnesses then aged fourteen and thirteen respectively who testified at the New Orleans trial.

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for respondent upon discovery request in this habeas proceeding. This was petitioner's first access to it.

This summary states in pertinent part:

> "While in jail Stinson got to bragging about how he had murdered wife in Michigan to cellmate.
>
> Stinson also bragged that he had killed his first wife in New Orleans on 9-10-77 and threatened his step-children into identifying neighbor as killer.
>
> . . .
>
> Det. Gallardo also got information from a second source that Stinson had killed New Orleans wife Collins." (Plaintiff Exhibit 5 at 2).

It is undisputed that State authorities suppressed the evidence concerning George Stinson that they received from Detective Gallardo. Respondent has admitted that neither Ronald Monroe, his attorneys, nor anyone acting on Monroe's behalf was ever informed by anyone acting on behalf of the State of any of this information. There was no showing that this non disclosure was willful or malicious. For some unexplained reason the information never got to the attention of the prosecutor. This fact that the District Attorney's office may not have known of the information communicated by Detective Gallardo to the Police Department is immaterial. The obligation to disclose attaches whenever the police in the prosecuting jurisdiction possess exculpatory evidence. United States v. Agurs, 427 U.S. 97, 110 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Freeman

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v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)

The second element of proof in establishing a Brady violation is that the suppressed evidence is favorable to the defendant. It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime for which he has been convicted coupled with a suggestion of a second source of information in support. Stinson's denial that he confessed the New Orleans murder to his cellmate in Michigan does not, of itself, render the evidence unfavorable. His Michigan attorney protected his interests and secured a grant of immunity from prosecution for the New Orleans murder. (Stinson Exhibit 1). Nonetheless, a confession at this time under these circumstances might adversely effect whatever Michigan release from custody rights he enjoys. His Michigan sentence was confinement for a minimum term of ten years, a maximum of twenty-five. (Plaintiff Exhibit 8).

The final element, materiality of the suppressed evidence is also established. The suppressed material (Plaintiff Exhibit 5) enhanced by the evidence adduced at the hearing sufficiently creates a reasonable doubt that did not otherwise exist. A parallelism between the Michigan and New Orleans murders was shown. In each Stinson was the husband, in each a possible motive may have been the wife's apparent disaffection, in each a stabbing and in each a suggestion of witness intimidation. The State trial

U.S.D.C.

judge did not have the advantage of having this evidence produced to him some seven months after trial when it surfaced. Some three years after trial a different State judge heard petitioner's post-conviction claims, but even then did not have the text of the suppressed evidence (Plaintiff Exhibit 5), rather only a suggestion concerning the Michigan information. A reasonable doubt has been shown to now exist, when had not formerly, evaluated in the context of the entire record.

Petitioner has satisfied Brady - Argus criteria. His ground two of this petition for a writ of habeas corpus is meritorious. It is, accordingly, RECOMMENDED that a writ of habeas corpus be GRANTED and that the Court issue whatever order(s) be deemed appropriate.

New Orleans, Louisiana, February 2, 1984.

MARCEL LIVAUDAIS, JR.
United States Magistrate

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal.

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, ET AL	*	SECTION "F" (5)

MEMORANDUM OPINION

This matter came before the Court on the Petition of Ronald S. Monroe for a Writ of Habeas Corpus, and was referred to United States Magistrate Livaudais for an evidentiary hearing. 28 U.S.C. 636 (6)(1)(B). Pursuant to the Court's order the Magistrate held an evidentiary hearing and issued findings and recommendations.

On February 14, 1984 the respondents filed objections to the Magistrate's findings and recommendations. When objections to a Magistrate's report are filed the Court is requried to make de novo findings as to all portions of the report that are subject to an objection. 28 U.S.C. 636(b)(1)(c). After carefully considering the transcript of the evidentiary hearing as well as all supporting documents in light of the respondents' objections, the Court believes that the Magistrate's findings and recommendations are without error, and the Court adopts the Magistrate's report as its own findings and conclusions. In compliance with the mandate of 28 U.S.C. 636 (b)(1)(c) the

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Court is issuing this Memorandum Opinion in order to address the respondents' objections to the report.

The respondents first complain about the Magistrate's conclusion that the petitioner's complaint does not raise a claim that is cognizable under the theory of Brady v. Maryland 373 U.S. 83 (1964) and its progeny. In this regard they raise three objections.

First, they contend that petitioner's claim is nothing more than a request for a new trial based on newly discovered evidence. This contention is clearly in error. The petition, accompanying legal memoranda and the issues raised at the evidentiary hearing clearly indicate that petitioner bases his request for relief in Federal court on the fact that during the post-conviction relief period the State possessed exculpatory evidence and failed to turn it over to the defendant. Such a claim is cognizable under Brady.

Second, the respondents contend that the State is under no duty to give a defendant exculpatory evidence which was obtained after the defendant was convicted. In granting petitioner's request for a stay of execution, the Court held that the duty to disclose exculpatory material continues beyond the trial of a criminal case up to and including the time that an accused may apply for a new trial. In re Petition of Larry James Wright, 282 F.Supp. 999 (W.D. Ark. 1968). The State points to the fact that the Court in Wright failed to cite Brady and argues that this case does not impose a continuing

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obligation under Brady, to disclose exculpatory evidence. This argument exalts form over substance and is without merit. The Brady cases stand for the proposition that due process is denied because the trial is fundamentally unfair when the prosecution fails to give the defendant exculpatory evidence that is material to an accused's guilt or innocence. These cases turn on the belief that society benefits when our system of criminal justice is fair, and rejects the sporting notion of justice. These same concerns were expressed by the court in Wright. In that case Judge Miller held that it was unfair and a violation of due process for a prosecutor to withhold exculpatory evidence which was acquired while the accused could file a motion for a new trial. The analysis used in Wright closely parallels the reasoning applied in Brady. It supports this Court's holding that it is fundamentally unfair and contrary to society's notions of justice for a prosecutor to withhold material exculpatory evidence which he acquires while the defendant is entitled to file a motion for a new trial. Wright did not cite Brady, but it clearly adopted Brady's mandate and purpose.

Third, the respondents contend that Wright is distinguishable because the facts that were in the prosecutor's possession were more credible and were more clearly probative than the material held by the police authorities in New Orleans. This objection goes to the standard of materiality will be examined in this opinion.

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The respondents complain that the information given to the New Orleans police is based on hearsay and rumor and is, therefore, not credible.

To the extent that this complaint goes to the admissibility of the Brady material, this contention is irrelevant. Sellers v. Estelle, 651 F.2d 1074 (1981) cert. den. 102 S.Ct. 1292. The assertion that the information that was given to the New Orleans Police Department was not credible and does not rise to the level of Brady material is without merit. This argument is undercut by the fact that after Officer Mckenzie received the information from Detective Gallardo he found it sufficiently credible to merit his further investigation. More importantly, at the evidentiary hearing Stinson admitted making the statement in reference to Lenore Collins' death "... that she was killed the same way Erma Lofton was." Magistrate's Hearing 1/30/84 at 55. Although Stinson attempted to deny that this statement was an admission that he killed Ms. Collins, his former common law wife, this statement could be viewed by a trier of fact as a confession which would by logical necessity exculpate Monroe. See, Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981); A.B.A. Standards for Criminal Justice 11-21(c). At the least, it is material bearing on the guilt or innocence of petitioner which a State court should be obliged to consider in a request for new trial; material that was heretofore unavailable.

Since there was no allegation that Monroe's attorney made a request for this evidence, the proper standard for

determining whether the evidence that was withheld is material is whether it creates a reasonable doubt that did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976); Canon v. State of Alabama, 558 F.2d 1211 (5th Cir. 1977). To make this evaluation the Court has carefully examined the trial transcript from Monroe's second trial. United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978); Cannon, supra. This new evidence creates a reasonable doubt that did not otherwise exist. The Court's reading of the record reveals there was no sign of a forced entry into the Collins home. This, coupled with the fact that no murder weapon or blood stained clothing or rags were found at or around Monroe's home, indicate that Monroe may not have committed the murder. The record also reveals that Monroe's mother testified that on the day of the murder Stinson came by the Collins home and tried to see his ex-common law wife. After he was told that she was not at home he said that he would come back that evening. This evidence makes the assertion that Stinson committed the murder plausible.

The only evidence that directly linked Monroe to the murder was the eyewitness testimony of the victim's two children. Although this testimony would seem to clearly establish Monroe's guilt, the Court is disturbed by many aspects of their testimony. First, the Court believes that it is most curious that Joseph Collins ran into the Monroe household to seek assistance when Monroe was, allegedly, in the process of murdering his mother. Second, Detective Gallardo's testimony, at the evidentiary

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concerning the facts surrounding the allegation that Stinson intimidated witnesses in Michigan as well as the Bridges testimony concerning the possibility that the children may have been coerced, supports the Court's concern that the children's testimony should be weighed against the exculpatory evidence by a State court.[1] This is not to say that a trier of fact might not conclude that the children's testimony is credible. The Court expresses no opinion on this matter. The Court is, however, faced with the task of evaluating the record to determine the possible effect that the evidence that was withheld might have upon a trier of fact.

In light of the Court's careful evaluation of the record, the fact that Stinson made a statement that could be reasonably construed as a confession leads this Court to find that this evidence creates a reasonable doubt as to Monroe's guilt that did not previously exist. The Court was, therefore, obliged to issue the Writ of Habeas Corpus on the ground that Monroe's due process Brady rights were violated. Austin v. McKaskle, No. 82-1418 slip op. (5th Cir. Feb. 3, 1984).

In reviewing the record from Monroe's post conviction motion before the Criminal District Court for the Parish of Orleans the Court finds, contrary to respondent's assertion, the the trial court denied Monroe the opportunity to effectively

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[1] For reasons best known to respondents, the Collins children were not called to testify at the evidentiary hearing before the Magistrate.

raise the claim that his Brady rights were violated. Respondent admits at this hearing that Monroe was unable to present the exhibits to the trial court which were produced at the evidentiary hearing held by the United States Magistrate. Monroe was also unable to introduce in the trial court the testimony elicited at the evidentiary hearing.

Since the evidence came into the possession of the authorities in New Orleans after Monroe's conviction but before the expiration of the time that a motion for a new trial based on newly discovered evidence could have been filed, this Court finds that the taint caused by the State's violation of Monroe's Brady rights unconstitutionally impaired his right to file a motion for a new trial or obtain post conviction relief. Since the Court is obliged to fashion a remedy that disposes of the claim so as to do what justice and the law require, 28 U.S.C. 2245, the Court is empowered to fashion a remedy that redresses the deprivation Monroe actually suffered. Thus, the Court entered an order which requires the State to provide to Monroe whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on newly discovered evidence c. f. Dowd v. United States, 340 U.S. 206 (1955).

This Court expresses no opinion regarding the guilt or innocence of Monroe. Our obligation is to decide whether any aspect of the State court criminal proceeding was constitutionally defective, if the State court fails to do so. That

issue has now been decided. The period during which Monroe could request a new trial was tainted with constitutional infirmity because material exculpatory matter bearing on Monroe's guilt or innocence was suppressed.

It is now the obligation and duty of the State court to grant Monroe post-conviction relief rights that comport with his constitutional rights.

New Orleans, Louisiana, this 28th day of February, 1984.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
FEB 15 11 49 AM '84
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

RONALD S. MONROE	*	CIVIL ACTION
VERSUS	*	NO. 83-6277
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA	*	SECTION "F"(5)

O R D E R

The Court having reviewed the Findings and Conclusions of Magistrate Livaudais, the transcript of hearing held on January 30, 1984 and the exhibits received, and after considering Respondent's Objection to Magistrate's Findings and Conclusions, accepts the Magistrate's Findings and Conclusions and finds that Petitioner's due process rights during the post-conviction relief period following his trial were unconstitutionally deprived because material exculpatory matter bearing directly on his guilt or innocence was suppressed by the local prosecuting authority after his conviction in violation of the United States Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1964).

Now that this Court has determined the Federal constitutional question the State courts of Louisiana should find it possible to provide the post-conviction review to which Petitioner is entitled. Therefore,

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IT IS ORDERED:

That the Petition of Ronald S. Monroe for a Writ of Habeas Corpus is granted; and

IT IS FURTHER ORDERED:

That Petitioner's date of execution is postponed and the State of Louisiana is directed to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based upon the exculpatory material which the State courts did not have an opportunity to consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction relief rights under Louisiana law.

Written reasons will follow shortly.

New Orleans, Louisiana, this 15th day of February, 1984.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
'84 APR 27 P 3:24
LORETTA G. WHYTE
CLERK

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RONALD S. MONROE	*	
	*	PAUPER CASE
VERSUS	*	
	*	
ROSS MAGGIO, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA	*	NO. 83-6277
	*	SECTION "F"

* * * * * * * * * * * * * * * * * * *

Proceedings on Petitioner's Motion to amend judgment held in the above entitled and numbered cause on April 25, 1984, before The Honorable Martin L. C. Feldman, U. S. District Judge.

* * * * *

A P P E A R A N C E S:

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New Orleans, La., 70119

* * * * *

REPORTED BY RICKEY P. MARSHALL, OCR.

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PROCEEDINGS, APRIL 25, 1984:

MR. DIGIULIO: Your Honor, John Digiulio, for Ronald Monroe. I would like to introduce Douglas Morris and Alan Brumstein, of PAUL, WEISS, RIFKIND, WHARTON and GARRISON.

I would ask the Court's permission to permit Mr. Blumstein to argue the motion this morning.

THE COURT: Certainly. You're welcome here, Sir.

MR. BLUMSTEIN: Good morning, Your Honor. This is a motion by the petitioner to amend the order and judgment that has previously been filed in the habeas corpus proceedin

The amendment that we seek if a direction that the petition be released from custody unless the state affords him a new trial.

As we pointed out in our papers, this is the remedy, so far as we can tell, that has been granted in every other Brady case we have been able to find, that is, every case in which the Court has found a violation of Brady.

Our essential proposition is that under Brady and subsequent cases, this new trial remedy is the only appropriate remedy, and that is so because the essence of the Brady rule -- I'm quoting from the Agurs decision, is its overriding concern with justice of the finding of guilt.

When a Court has found as this Court has found, that

the state has suppressed exculpatory evidence which creates a reasonable doubt as to the defendant's guilt, all in violation of the prisoner's Constitutional rights, I respectfully submit I don't know how that violation can be remedied without affording the defendant a new trial. I will also urge this proposition upon Your Honor.

Ultimately, no matter what procedural course the future proceedings in this case takes that will have to be the outcome.

To demonstrate that, I would like to focus on what would happen if we went back to the State Court in accordance the judgment as it is presently written for post-conviction relief. I think in the course of that focusing, I can explore some of the differences between our position and the State's position.

As I see it, there are a number of possibilities as to what might happen in State Court. Possibly an evidentiary hearing.

I would like to suggest to Your Honor that the last thing in the world we need in this case is another evidentiar hearing for the simple reason that we had one. We had it here before Magistrate Livaudais. It was a full hearing. It was a fair hearing. We had witnesses down from Michigan, including two prisoners in the custody of the Michigan authorities.

There were detailed findings of fact. Your Honor

gave de novo review to those findings of fact, and confirmed them. The notion that we should now go back to the State Court and have another evidentiary hearing just strikes me as being almost ludicrous. Let's remember the Brady claim was squarely presented to the State Court back in December in a motion for a new trial, and we asked for a hearing, and the State said no. We came here. We did get the hearing. We prevailed at the hearing. It is almost bazaar that the remedy is that we should now go back to the State Court to have another hearing in which the State is going to argue that the State Court should make findings of fact contrary to what this Court has already found.

THE COURT: I have not ordered the State Court to have another hearing. I have ordered the State Court to discharge its Constitutional responsibilties as this Court has done by giving him a hearing on a motion for a new trial.

In considering the material not presented to the State Court at the time, a previous request for a new trial was made. If anything bazaar is going on in this courtroom right now, Sir, it's your convenient overlooking of the fact that the man's Brady rights were violated, not during the period of his conviction, but during the period of his post-conviction relief. His trial was a

perfectly valid, Constitutionally proper trial, in which he was found guilty of murder.

MR. BLUMSTEIN: Well, may I --

THE COURT: The Constitutional taint occurred after his conviction.

MR. BLUMSTEIN: I understand that, Your Honor. I didn't mean to overlook that. I was going to come to it later on.

THE COURT: I suggest when you do you not use the word "bazaar" again.

MR. BLUMSTEIN: I will not. I'm sorry. Let me deal with that. I think the State argues and I think Your Honor has indicated to me that you agree that the man had a fair trial, and since the violation took place during the post-conviction, the remedy should be as Your Honor --

THE COURT: I ordered the State to Grant this petitioner whatever post-conviction relief he was entitled to under State law, taking into account the material regarding the so-called confession by another inmate which the Court had not had an opportunity to consider at the time the petitioner filed his first request for a stay of execution and a heaviest relief in the State Court system.

This Court has discharged its Constitutional obligation. Now it's up to the State to decide how they are going to discharge theirs.

I found absolutely no Constitutional infirmity with

the man's trial.

MR. BLUMSTEIN: I understand that.

THE COURT: And you agree also, I take it, under Dowd I have the right to fashion whatever remedy is appropriat in the best interest of justice.

MR. BLUMSTEIN: I have no doubt about that.

THE COURT: Since his trial was not Constitutionally infirm, why, and what right --What jurisdiction do I have to order the State to Grant him a new trial? Isn't it up to the State to decide whether or not he should be granted a new trial? Isn't aht why we have the Federal and State system?

MR. BLUMSTEIN: Yes, Your Honor, except that in determi that issue, the question to be decided is an issue of Federal Constitutional law, which I suggest you have already decided.

THE COURT: I have already decided that during the period of post-conviction relief, his Brady rights were violated, and that he was entitled to have a request for a ne trial heard on the basis of the material, which was subsequently disclosed in this Court. State Courts have never considered that material. It is up to the State Courts, having considered that material, to decide whether the man is entitled to a new trial.

MR. BLUMSTEIN: By what standard, Your Honor?

THE COURT: By the very standard he was given a fair trial in the first place.

MR. BLUMSTEIN: Well, the State says that the standards to be applied are the State's standards. Would it lead to a verdict of acquittal?

What I'm suggesting to Your Honor is that the Agur's decision tells us that can not be the standard. The standard should be the Federal standard announced in Agur's, reasonable doubt.

Your Honor has found that the evidence which is suppressed -- which was suppressed creates that reasonable doubt.

THE COURT: Evidence which the State never had a chance to consider. The fact that a Federal Court might believe there is reasonable doubt isn't necessarily a compelling reason for the Federal Court to tell a State Court to give the men a new trial, which in the first instance was a fair trial.

MR. BLUMSTEIN: Well, with all due respect, I think the finding of the concept of a fair trial is in a fairly artificial and limited way. There is a process that goes on. The suppressed evidence in this case was a confession.

One of the interesting things about a confession is that it can come at any time. Some confessions come minutes or hours after a crime is committed.

Other confessions -- there is the expression "death

bed confession."

The notion that coincidentally this confession did not come till after the trial was over and therefore was not in existence at the time of trial -- the notion that this means that the trial was, for Brady purposes, a fair trial I don't think is correct.

THE COURT: You're assuming that the man is innocent. I didn't find that the man was innotcent. I found that the material was of sufficient dignity to rise to the level of Brady material. It did create a reasonable doubt.

If you are asking me whether or not I think the man is innocent, I'll have to tell you no, not on the basis of the hearing that was held. You mentioned that there were two witnesses broughr down from prison in Michigan. They did not testify.

MR. BLUMSTEIN: One did testify, Your Honor.

THE COURT: I don't think the important one did. The detective testified. So I don't know whether the man is guilty or innocent. I know that the period of his post-conviction relief was tainted and was Constitutionally inform. I also know that his trial was not. It was not infirm or tainted.

It seems to me that the State has the obligation to decide whether on the basis of that material he should be given a new trial.

MR. BLUMSTEIN: Well, I have nothing to add, Your Honor.

That's my argument

THE COURT: Well, you cite "in re Wright"

MR. BLUMSTEIN: Yes.

THE COURT: I would like some comment on that, because this is a serious issue.

As I recall "Wright", the man had already exhausted his State Court remedies. That is why the Federal Judge there did not send it back to the State, but ordered a new trial. This is different, you see.

I have two concerns. I need not only be concerned about the violation of the Brady standard, which I take very seriously, but I also need to balance the interest of the State of Louisiana and the Federal Government.

I don't believe that Federal Judges should just go running around the country telling State Courts what to do. I think I made that clear in my opinion. If you want us to do that, then you should have Congress change the law and not give State Courts the right to even hear these things. Bring them here and let us hear them.

State Court Judges think we are anointed for life and are not subject to public pressure, and so why should they deal with them when we should? That's not what the law is. The law gives these people multiple opportunities. In the name of balancing Federal and State relations. If I order a new trial where there was a perfectly valid trial in the

first place, it seems to me I would do great violence to that fundamentally. That is why I think wisely the Court has spoken and said Judges should fashion remedies that are appropriate. Here it seems to me that the remedy that was appropriate was to find that his rights were violated during the period of post-conviction relief and that that is what the State Court needs to look at.

You can continue.

MR. BLOOMSTEIN: I just want to comment on "in re Wright". As I recall the decision, Your Honor, the issue of what the appropriate remedy was was just not raised. The Court dealt with Brady in the context of suppression after the conviction and just granted the traditional Brady remedy. I have nothing else to add, Your Honor.

THE COURT: Ms. Hunt, do you have anything to add which might make me rule against you?

MS. HUNT: I'll try not to.

THE COURT: I struggle with this very much. I must say that at first I was tempted to order the State to grant a new trial. I guess it's fair to say that the State should discharge its responsibiliy.

MS. HUNT: Your Honor, I believe that is the role that the State should play at this point. I don't think there's any difficulty in the State's ability to discharge its responsibility. As your Honor pointed out in the memorandum opinion in this case, the State and the Federal Court share

an equal responsibility for redressing violations of Constitutional rights.

THE COURT: I wish for once they would accept that responsibility.

MS. HUNT: That is occasionally a problem with the State Courts, as Your Honor has pointed out. They do not conduct full hearings. In this particular case, there was opportunity in State Courts to conduct a full hearing. If you will review the record in the case, what happened was that a continuance was denied the the petitioner did not have an opportunity to --although given an opportunity to have a hearing, no hearing took place.

The crucial distinction or the reason that a hearing now in State Court is necessary is that the evidence which this Court found most important to the resolution of the issue in the case, that evidence was not before the State Court and it is totally consistent with principles of comity.

THE COURT: That evidence could have been before the State Court if the Court had granted a hearing in the first place.

MS. HUNT: Your Honor, the evidence was not discovered. I'm speaking physically of the McKenzie notes. The evidence was not discovered until a subpoena duces tecum was served on respondents.

Once the Federal Court petitioned it, the proceedings had already begun. The evidence was not known of although the allegations of the existence of the evidence perhaps existed. The evidence itself did not come to light.

THE COURT: Ms. Hunt, this is an extremely serious case. This is a case where a man has been sentenced to death. I don't know if he's innocent or not. The allegations that this had occurred were made to the State Court. My point is that a hearing could have been held at that point, and these facts could have come to light. Frankly, they could have been more fully developed than they were developed in the hearing before Magistrate Livaudais.

MS. HUNT: In that light, Your Honor, I see no problem with the remanding of the case for such a hearing in the State Court.

THE COURT: I don't see any problem. I want to stress that. This Court feels very strongly about the State discharging its responsibilities in this instance. If this Co has any suspicion, or had, that those responsibilities had not been discharged, then I will discharge them for the State.

MS. HUNT: Your Honor properly has concern that the State Court system discharge its responsibility. It seems to me there is nothing to indicate that the State Court would not give a full hearing. No harm could come in this

in this very serious matter from having the most full hearing possible.

THE COURT: Not only a full hearing, but serious consideration.

MS. HUNT: There's nothing to indicate that the State would not take this matter seriously.

I think the State Court's behavior in the past showed that they would be just that.

THE COURT: Well, I'm not satisfied with what they have shown in the past.

MS. HUNT: I have nothing further, Your Honor.

THE COURT: Mr. Digiulio?

MR. DIGIULIO: Your Honor, very briefly, just to set the record straight, I know it has been some time.

The Petitioner's application for a hearing on this Brady question was denied, on the same papers that this Court granted a hearing on.

THE COURT: I'm aware of that.

MR. DIGIULIO: The only hearing we were granted was effectiveness of counsel, which we did not have time to put together.

THE COURT: You mean at the State Court level?

MR. DIGIULIO: Yes.

THE COURT: I'm thoroughly aware of that. I don't like the way it was handled at the State level at all.

MR. DIGIULIO: Thank you, Your Honor.

THE COURT: The motion is denied.

My opinion was clear. This Court has discharged its Constitutional responsibility.

At this point, to order a new trial would be, in the Court's view disrupt a very delicate balance between the State and Federal Government, because the trial of Mr. Ronald Monroe was not Constitutionally firm, only his period of post-conviction relief when exculpatory material was clearly suppressed by prosecuting authorities.

Material which bears materially on his innocence and which this Court expects the State due countenance of.

Motion is denied.

(Whereupon, the hearing was concluded.)

* * * * *

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed and qualified official court reporter for the United States District Court, Eastern District of Louisiana.

I further certify that the above and foregoing is a true and correct transcript of the proceedings in the above entitled matter, and on the date above specified, and that said transcript is a true and correct transcription of my stenographic notes.

Dated this 27 day of April, 1984, at New Orleans, Louisiana.

Rickey P. Marshall

RICKEY P. MARSHALL
Official Court Reporter
U. S. District Court
Section "F"

(1943). *See also Kerr*, 96 S.Ct. at 2124 ("[A]s a general rule 'appellate review should be postponed ... until after final judgment has been rendered by the court.'") (quoting *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 274, 19 L.Ed.2d 305 (1967)). The district court has not denied either proposed consent decree, but merely has deferred ruling pending a hearing, and there has been no showing that this deferral precludes workable and timely implementation of the injunctive relief being sought. Should the requested relief ultimately be denied, any error in such denial may be reviewed on appeal. Plaintiffs assert that they will be unnecessarily put to the burden of a hearing. Even were a hearing unnecessary or improper, however, that would not be a sufficient ground for mandamus. That "hardship may result from delay and perhaps unnecessary trial," or that a ruling may "give rise to a myriad of legal and practical problems as well as inconvenience," is not alone a sufficient reason to invoke mandamus to control the interlocutory rulings of the trial court, even though they may be clearly wrong. *Bankers Life & Casualty Co.*, 74 S.Ct. at 148. *See also Rocke*, 82 S.Ct. at 943, 944; *Will v. United States*, 88 S.Ct. at 274, 278. We stated in *Piekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir.1977):

> "Expense and inconvenience, without more, do not justify the issuance of mandamus.
>
> "....
>
> "Undoubtedly, plaintiff has been frustrated by the proceedings thus far in the prosecution of his case and it may be that ultimately an expensive retrial may be necessary. However, we find nothing extraordinary in these circumstances that should cause us to resort to such a drastic remedy."

Compare Elster v. Alexander, 608 F.2d 196, 197 (5th Cir.1979). These principles also establish that mandamus is inappropriate here.

[10] Finally, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr*, 96 S.Ct. at 2124. To the extent that we have discretion in the matter, we decline to issue the writ, for the reasons heretofore expressed.

CONCLUSION

Accordingly, the appeals are each DISMISSED for want of an appealable order. The petition for writ of mandamus is DENIED.

Ronald S. MONROE,
Petitioner-Appellant,

v.

Frank BLACKBURN, Warden, Louisiana State Penitentiary, Angola,
Respondent-Appellee.

No. 84-2281.

United States Court of Appeals,
Fifth Circuit.

Dec. 6, 1984.

Petitioner, who was convicted in Louisiana of first-degree murder and sentenced to death, appealed from an order of the United States District Court for the Eastern District of Louisiana, Martin L.C. Feldman, J., which ordered the State to reconsider his motion for a new trial under Louisiana law. The Court of Appeals, Reavley, Circuit Judge, held that: (1) habeas petitioner, who obtained an order requiring State to reconsider his motion for new trial based on District Court's finding that petitioner's right to due process under *Brady* had been violated during postconviction relief period but who failed to show that his right to a fair trial was prejudiced by the postconviction suppression of evidence, was not prejudiced by District Court's failure to grant him a new trial; (2) trial court did not

abuse its discretion under *Witherspoon v. Illinois* by dismissing from murder trial potential jurors who made it clear that they would not consider the death penalty under any set of facts and circumstances; and (3) petitioner was not denied effective assistance of counsel.

Affirmed.

1. Habeas Corpus ⇐113(6)

State's argument that habeas petitioner should not have been granted an additional hearing in state court was not before reviewing court where State failed to cross-appeal from federal habeas court's order requiring State to reconsider petitioner's motion for new trial.

2. Habeas Corpus ⇐25.1(4)

Habeas petitioner, who obtained an order requiring State to reconsider his motion for new trial based on district court's finding that petitioner's right to due process under *Brady* had been violated during postconviction relief period but who failed to show that his right to a fair trial was prejudiced by the postconviction suppression of evidence, was not prejudiced by district court's failure to grant him a new trial. U.S.C.A. Const.Amend. 14.

3. Habeas Corpus ⇐85.5(8)

Habeas petitioner failed to establish that Louisiana trial judge "coerced" the jury in his murder trial so as to cause it to return a death sentence after foreman had requested instructions on procedure to follow in event that a deadlock could not be broken. U.S.C.A. Const.Amends. 8, 14; LSA-C.Cr.P. art. 905.8.

4. Jury ⇐106

Venireman's responses and his statement that he would consider imposition of death penalty only if defendant confessed to crime of murder was the equivalent to the position that he would not consider the death penalty under any circumstances.

5. Jury ⇐106

Trial court did not abuse its discretion under *Witherspoon v. Illinois* by dismissing from murder trial potential jurors who made it clear that they would not consider the death penalty under any set of facts and circumstances.

6. Habeas Corpus ⇐89

Federal habeas court did not abuse its discretion in failing to order a separate evidentiary hearing on issue of whether petitioner, who was convicted of first-degree murder, might be able to establish that a *Witherspoon*-qualified jury would be predisposed to favor the prosecution on issue of guilt. 28 U.S.C.A. § 2254(d).

7. Criminal Law ⇐641.13(2)

Petitioner, who was convicted of murder in a Louisiana state court, was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6.

Allan Blumstein, Steven Gey, Douglas G. Morris, Matthew Fishbein, Eric Freedman, New York City, John DiGiulio, Baton Rouge, La., for petitioner-appellant.

Wm. R. Campbell, Jr., Susan Scott Hunt, Asst. Dist. Attys., New Orleans, La., for respondent-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, RANDALL and WILLIAMS, Circuit Judges.

REAVLEY, Circuit Judge:

Ronald S. Monroe was convicted in Louisiana of first degree murder and was sentenced to death. After exhausting his state remedies, he filed this petition for habeas corpus. The district court held that Monroe's right to due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1964), had been violated during the post-conviction relief period, and it ordered the State to reconsider Monroe's motion for a new trial under Louisiana law. Monroe appeals contending that it was error for the district court not to order the State to grant him a new trial. We affirm.

I. *Facts*

Ronald Monroe was the neighbor of the murder victim, Lenora Collins, who lived in the adjoining one-half of a duplex in New Orleans, Louisiana. He was convicted on January 22, 1980, of her murder after being identified as the murderer by the victim's two children.

The federal district court heard Monroe's application under 28 U.S.C. § 2254 (1982) and held that all of his claims lacked merit except for his claim that he was denied due process. It ordered an evidentiary hearing on that issue before a federal magistrate where it was disclosed that a New Orleans policeman had taken notes of a July 1980 conversation with a detective in Michigan. The notes stated that Collins' former common-law husband, who had murdered his common-law wife in Michigan, made statements indicating he might have murdered Collins as well. These notes were not considered by the state court in its disposition of Monroe's motion for a new trial. Because the State had failed to disclose this information to Monroe, the magistrate concluded that his due process rights under *Brady* had been violated.

The district court adopted the findings and conclusions of the magistrate; however, because the violation occurred during the post-conviction relief period, the court did not order the State to grant Monroe a new trial. Instead, it ordered the State "to grant [Monroe] whatever he was entitled to by way of post-conviction relief ... provided by Louisiana law for a request for a new trial based upon the exculpatory material which the state courts did not have an opportunity to consider."

It is from this judgment of the district court that Monroe appeals, arguing that he should have been granted a new trial as a matter of law. He also raises four other issues. First, he argues that he was sentenced in violation of double jeopardy. Second, he asserts that certain venire members were excluded from the jury in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Third, he argues that he was improperly denied a separate evidentiary hearing on the question whether the "death-qualified" jury that convicted him was predisposed to favor the prosecution on the issue of guilt. Finally, Monroe claims that he was denied effective assistance of counsel.

II. *Discussion*

A. *Suppression of Material Evidence*

[1] The State argues that Monroe should not have been granted an additional hearing in the state court. That question is not before us because the State failed to cross-appeal. *See RobicAseux v. Radcliff Material, Inc.*, 697 F.2d 662 (5th Cir.1982). The State argues that we should consider this point to prevent a miscarriage of justice. *See Fyrnach v. Estelle*, 696 F.2d 318 (5th Cir.1982), *cert. denied*, 461 U.S. 937, 103 S.Ct. 2108, 77 L.Ed.2d 313 (1983). We see no miscarriage of justice here, although we might have reached a different conclusion from that of the district court.

[2] Monroe claims, however, that the district court erred by failing to grant him a new trial. We disagree. The new trial remedy afforded after a *Brady* violation has occurred is given because the defendant's right to a fair trial has been prejudiced by the suppression of evidence. *See United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). Monroe has failed to show that his right to a fair trial was prejudiced by the post-conviction suppression of evidence. Indeed, the existence of prejudice to Monroe, arising from the State's failure to disclose the existence of the policeman's notes, is doubtful since the same underlying information was apparently considered as newly discovered evidence in Monroe's motion for new trial. Because an additional state hearing is to be held, in which all of the information will be considered, there is no possibility that Monroe's rights will be prejudiced.

B. *Double Jeopardy*

[3] During the sentencing phase of the trial, the jury returned after approximately forty-five minutes of deliberation, and the foreman indicated that a unanimous deci-

sion could not be reached. The foreman also requested instructions on the procedure to follow in the event the deadlock could not be broken. The trial judge responded by instructing the jury that if it was unable to agree unanimously upon a verdict within a reasonable time, a life sentence would be imposed. Monroe claims that the trial judge "coerced" the jury and violated his rights to a fair trial and due process, as well as article 905 of the Louisiana Code of Criminal Procedure, by failing to impose the life sentence at this point.

Aside from any constitutional question, Monroe has no Louisiana authority to indicate that a life sentence must be imposed whenever a trial judge requires a jury to deliberate for a reasonable time before finding that the jurors cannot agree. We see nothing in this record indicating that the trial judge "coerced" the jury, causing it to return the death sentence. Under Louisiana law, the trial judge is the one who determines when a jury is hung for purposes of the applicable statute, La.Code Crim.Proc.Ann.Art. 905.8 (West 1984). The Louisiana Supreme Court held in Monroe's direct appeal that a "palpable abuse of discretion" was not shown. *State v. Monroe*, 397 So.2d 1258, 1271-72 (La.1981). We accept that decision and reject the argument that a constitutional deprivation occurred.

C. *Witherspoon and Fair Trial*

1. *Voir Dire*

[4, 5] Monroe argues that the state trial court abused its discretion by dismissing four venire members. First, we regard John Lee's responses and his statement that he would consider the imposition of the death penalty *only if* the defendant confessed to the crime to be equivalent to the position that he would not consider the death penalty under any circumstances. Second, Florence LeDoux responded: "If we had to recommend the death penalty, I couldn't do it." Carl Woods and Clarence E. Matthews responded similarly. These venire members made it clear that they would not consider the death penalty under any set of facts and circumstances. The trial court did not abuse its discretion under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), by dismissing these potential jurors. *See O'Bryan v. Estelle*, 714 F.2d 365, 372 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984).

2. *The "Conviction-Prone" Jury*

[6] The Supreme Court in *Witherspoon* left open the question whether a defendant might be able to establish that a *Witherspoon*-qualified jury would be predisposed to favor the prosecution on the issue of guilt. 391 U.S. at 521 n. 18, 88 S.Ct. at 1775 n. 18, 20 L.Ed.2d at 784 n. 18. Monroe asserts that the district court should have ordered a separate evidentiary hearing on that issue, arguing that the Supreme Court implicitly adopted such a requirement in *Maggio v. Williams*, — U.S. —, —, 104 S.Ct. 311, 314, 78 L.Ed.2d 43 (1983). We disagree.

We read *Williams* as a comment on the discretion of the district court in its denial of an evidentiary hearing. In this case, the district court reviewed the findings of the state court and saw no reason for a separate evidentiary hearing. This denial was within its discretion under 28 U.S.C. § 2254(d) (1982).

D. *Effective Assistance of Counsel*

[7] Monroe argues that he was denied effective assistance of counsel because his counsel, John Lawrence, did not investigate the possibility that the victim's former common-law husband had committed the murder. However, Lawrence did interview three other witnesses and he was given no reason to investigate the ex-husband. He indicated that he never considered the "matter as worth much." He assumed that the eyewitness identification of Monroe as the murderer precluded the possibility that someone else had killed her. Monroe was not denied effective assistance; Lawrence made "a reasonable decision that [made further investigation] unnecessary." *Strickland v. Washington*, — U.S. —,

——, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984).

Monroe also argues that he was denied effective assistance of counsel because of Lawrence's handling of the sentencing phase of the trial. During that stage of the trial, Lawrence tried to convince the jury of the immorality of the imposition of the death penalty, and of its ineffectiveness as a deterrent against crime. He called as witnesses a priest, a social worker, a professor of criminology, and Monroe's mother. Lawrence also put on evidence of Monroe's lack of a criminal record, his age and his intoxication on the night of the crime. A reasonable effort was put forth in preparing this defense. We recognize that there was very little reason to expect an anti-capital-punishment argument to persuade a *Witherspoon*-qualified jury not to impose the death sentence, but Lawrence made a reasonable choice with the evidence available to him. We agree with the district court's decision that Monroe was not denied effective assistance of counsel.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Oscar W. WESLEY and Velma Cooper, Defendants-Appellants.

No. 84-3357.

United States Court of Appeals, Fifth Circuit.

Dec. 5, 1984.

Defendant was convicted in the United States District Court for the Middle District of Louisiana, at Baton Rouge, Frank J. Polozola, J., of possessing a firearm after having been convicted of a felony, influencing due administration of justice, and tampering with a witness, and codefendant was convicted of obstructing the due administration of justice, and they appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that defendant who was alleged to have urged and advised witness to testify falsely was properly charged with both obstruction of justice and with intimidating a witness under another statute.

Affirmed.

1. Obstructing Justice ⇐4

By enacting new statute to address certain kinds of witness intimidation and simultaneously deleting from earlier statute, which prohibits obstruction of the due administration of justice, all references to witnesses, Congress did not intend that threats against witnesses would fall exclusively under the new statute and be exempt from prosecution under the earlier statute; earlier statute remains applicable to obstruction of the administration of justice by attempts to influence witnesses. 18 U.S.C.A. §§ 1503, 1512.

2. Criminal Law ⇐29, 299(1)

Defendant who was charged with urging and advising witness to testify falsely was properly charged with both obstruction of justice and with intimidating witness under another statute, with result of that convictions under both statutes were not multiplicious or violative of double jeopardy clause. 18 U.S.C.A. §§ 1503, 1512; U.S.C.A. Const.Amend. 5.

J. Michael McDonald (Court-Appointed), Baton Rouge, La., for Wesley.

David E. Stanley (Court-Appointed), Baton Rouge, La., for Cooper.

Stanford O. Bardwell, U.S. Atty., Merrick J. Norman, Jr., Asst. U.S. Atty., Baton Rouge, La., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Louisiana.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JUL 1 1985
ALEXANDER L. STEVAS
CLERK

ORIGINAL

84-6667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

NO.

RONALD S. MONROE,
Petitioner

Versus

ROSS MAGGIO, Warden,
Louisiana State Penitentiary,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY FOR
THE PARISH OF ORLEANS

DOLORES V. MASON SMITH,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

RONALD S. MONROE,
Petitioner

Versus

ROSS MAGGIO, Warden,
Louisiana State Penitentiary, Angola,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Procedural Disposition

Appellant has been twice tried and twice convicted for the murder of Lenora Collins; he has twice been sentenced to death. The first trial occurred on January 24, 1978. On direct appeal to the Louisiana Supreme Court, that conviction and sentence was reversed because of an error that occurred during the jury selection. See State v. Monroe, 366 So.2d 1345 (1978). Thereafter, appellant was retried on January 22, 1980 and again the jury convicted appellant of first degree murder and again appellant was sentenced to death. That conviction was affirmed by the Louisiana Supreme Court in State v. Monroe, 397 So.2d 1258 (1981).

STATEMENT OF THE CASE

i) Facts

Petitioner, Ronald Monroe, lived next door to Lenora Collins, the murder victim, at 1677 Religious Street in New Orleans, Louisiana. Mrs. Collins lived on one side of what is known in New Orleans as a shotgun double house with her two children, Joseph, who was twelve at the time of the murder and Theodise, who was eleven. Petitioner lived on the other side of the duplex with his mother and occasicnally other members of his family. During the summer and early fall of 1977 Mrs. Collins' mother, Inez Calhoun, finally succeeded in arranging the necessary financing to buy both halves of the duplex for her and her daughter and the children. This purchase meant that the Monroes would be forced to move from their side of the house immediately. Mrs. Calhoun sent a registered letter to the Monroes informing them that she had purchased the house and that she wanted to assume immediate occupancy. This letter was delivered to the Monroe house on September 9, 1977. Petitioner signed for the receipt of the letter.

The next night Lenora Collins was asleep in her house with her children in the same room because it was hot and that was the only air conditioned room in the house. Around 3 a.m. petitioner crawled into the victim's side of the house through a window and attacked the victim with a large knife. During the struggle that ensued the victim was stabbed many, many times by the petitioner. The children were awakened by the screams of their mother. Theodise tried to help her mother fight

with petitioner by picking up a can and hitting petitioner. Petitioner then stabbed Theodise once in the back puncturing her lung. At the same time, Joseph ran out of the house to get help. He first ran next door and told petitioner's mother to call the police because petitioner was stabbing his mother. Petitioner's mother refused to call anyone, and after a few moments, Joseph heard petitioner enter the back of the house shouting, "I got her, I got her." Doc. 1A, Tr. 1920, p. 117.

Joseph then ran from petitioner's house with the petitioner chasing behind him. The child succeeded in hiding from petitioner and eventually he arrived at his aunt's house, which is not far from the scene of the murder. Joseph immediately told the aunt that the petitioner had broken into his house and had stabbed his mother. The aunt, Carol McGraff, called the police and went to the victim's house. The police arrived and were told by Joseph that his neighbor, Ronald Monroe, had stabbed his mother. The police found the petitioner at his house with cuts on his hand; after the petitioner was taken to the front porch, Joseph identified him as the murderer. Theodise Collins, who had been taken to the hospital because of the serious wound inflicted upon her by petitioner, later also named Ronald Monroe as the murderer. Petitioner was arrested for first degree murder at the scene of the offense.

Petitioner has been twice tried and convicted for the murder of Lenora Collins; he has twice been sentenced to death. The first trial occurred on January 24, 1978. On direct appeal to the Louisiana Supreme Court, that conviction and sentence was reversed because of an error that occurred during the

jury selection. See State v. Monroe, 366 So.2d 1345 (1978). Thereafter, petitioner was retried on January 22, 1980 and again the jury convicted petitioner of first degree murder and again petitioner was sentenced to death.

In September of 1980, the New Orleans Police Department was contacted by Det. Joseph Gallardo of Pontiac, Michigan. Gallardo told Sgt. John McKenzie, of the New Orleans Police Department, that he had learned some interesting facts during his investigation of the stabbing murder of Erma Jean Lofton by George Stinson. Gallardo continued that Stinson was presently incarcerated in Michigan after having been arrested for this murder and that Francis Lee McWilliams, Stinson's cellmate, told Gallardo that Stinson confessed to killing Lofton.

Gallardo further related that McWilliams stated that Stinson remarked to him that his former common-law wife, Lenora Collins of New Orleans, had died the same way Lofton had. Gallardo stated that he had also learned from Linda Bridges, Lofton's sister, that Stinson had killed Collins of New Orleans. A full investigation later revealed that Bridges lived in New Orleans where she worked at a Popeye's Fried Chicken outlet with Joanne Monroe, petitioner's wife, who was the instigator of that rumor.

Sergeant McKenzie jotted down notes during his conversations with Gallardo and placed these notes in the mail slots of the officers originally assigned to the Collins murder investigation. These notes were discovered, untouched, immediately prior to the evidentiary hearing in the United States District Court for the Eastern District of Louisiana on January 30, 1984.

ARGUMENT

I.

Petitioner requests that this Honorable Court recommend a new trial as the proper federal constitutional remedy for post-conviction newly discovered evidence, citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The facts of the case at bar do not meet the specifications for a Brady violation, thus petitioner cannot avail himself to the remedy of a new trial. The law is clear in the State of Louisiana that the remedy for the discovery of new evidence after trial is a hearing on a motion for a new trial. Louisiana Code of Criminal Procedure Article 851.

The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). While the Brady decision is clearly the most important disclosure case decided by this Court, several issues were left unresolved affecting the circumstances in which material "favorable" to the defense must be disclosed to the defense and the result of nondisclosure. Petitioner assumes the resolution of these issues and begs this Court to apply the Brady/Agurs standard after trial so as to discourage prosecutorial misconduct after trial in the same manner as it discourages prosecutorial misconduct before and during trial.

Petitioner's argument reflects a misunderstanding of this Court's constitutional concerns in Brady and United States

v. Agurs, 427 U.S. 98 (1976), which cases were solely concerned with the corruption of the trial process. The constitutional violation requiring reversal was one affecting the fairness of the trial. Unless the omission deprived the defendant of his right to a fair trial, there is no constitutional violation. Absent a constitutional violation, there is no breach of the prosecutor's constitutional duty to disclose. United States v. Agurs, supra, 96 S.Ct. at 2399, 427 U.S. at 108 (1976).

Brady was confined by its facts to situations in which a specific request is made for exculpatory material in possession of the prosecution at the time of the request. In Agurs, supra, this Court gave to Brady a broader affect by holding that some exculpatory material must be disclosed even without a request or where there has been but a general request.

However, in neither Brady, Agurs, nor any other Supreme Court case concerning disclosure of information in criminal cases, has this Court addressed itself to defining the existence or extent of any duty on the part of the prosecution to disclose information not in its possession during trial. See Napire v. Illinois, 560 U.S. 264, 79 S.Ct. 1173 (1959); Gilis v. Maryland, 386 U.S. 66, 87 S.Ct. 793 (1967); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 1562 (1972). There is no legal precedent for petitioner's contention.

Petitioenr relies on a United States District Court decision from the Western District of Arkansas in his contention that Brady be extended to the post-conviction setting. In the

Petition of Larry James Wright, 282 F.Supp. 999 (1968), the Court concluded that information favorable to the accused which the state possessed while a motion for a new trial was pending should have been disclosed. Factually the case differs drastically from the case at bar. Further, the precedential value of the **Wright** decision is limited in that it was not predicated upon **Brady**, though decided several years after **Brady**. To date **Wright** has never been cited as authority by any court in this country.

In the instant case the information the state failed to disclose did not even exist at the time of the conviction. Thus, the state could not have suppressed the evidence during trial. Suppression of evidence not in existence until after conviction could not have affected the fairness of petitioner's trial. Therefore, **Brady** and **Agurs** are inapplicable to the facts of this case.

The "evidence" which petitioner claims the State of Louisiana suppressed stems from a confusing, if not truly bizarre set of circumstances. Ronald Monroe was twice convicted in a trial by jury and twice sentenced to die in the electric chair for the murder of Lenora Collins.[1/] Petitioner had lived next door to Mrs. Collins in a style of home known in New Orleans as a double shotgun. On September 9 of 1977, Inez Calhoun, the victim's mother, had informed petitioner and his mother that they would have to move out of the other half of the home. The following evening, while Mrs. Collins was asleep

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1/ The first conviction was reversed on appeal for reasons not relevant to this inquiry. **State v. Monroe**, 266 So.2d 1345 (1978).

in the same room with her children, ages eleven and twelve, petitioner crawled into the victim's side of the house and repeatedly stabbed Mrs. Collins causing her death. The children witnessed the stabbing and tried to help. The youngest child, Theodise, was stabbed in the back and suffered a punctured lung. The older child, Joseph, ran next door and told petitioner's mother to call the police because petitioner was stabbing his mother. Petitioner's mother refused to call anyone. After a few moments, Joseph heard petitioner enter the back of the house shouting, "I got her, I got her." Joseph then ran, with Monroe in pursuit, to his aunt's house for help. Joseph's aunt called the police and then she and Joseph went to the victim's house. When the police arrived at the Collins house, Joseph told them that his next door neighbor, Ronald Monroe, had killed his mother and stabbed his sister. The little girl confirmed this in the ambulance on the way to the hospital. Ronald Monroe was arrested after he was found in his bed next door with a cut hand and bloody towels in his house.

On January 23, 1980, Ronald Monroe was again convicted of the first degree murder of Lenora Collins and sentenced to death. Review of the trial transcript supports this conviction. Appellant was identified as the murderer by two eyewitnesses whose testimony was uncontradicted by any neutral witness Testimony of the state's witness precluded the possibility of the victim's children being intimidated into naming Monroe as the killer. There simply was not enough time between the killing and Joseph Collins' report of the killing for this to have occurred.

In September of 1980, the New Orleans Police Department was contacted by Det. Joseph Gallardo of Pontiac, Michigan. Gallardo told Sgt. John McKenzie at the New Orleans Police Department that one George Stinsor was incarcerated in Michigan after having been arrested for the murder of his common-law wife, Erma Jean Lofton. Gallardo informed McKenzie that a man named Francis Lee McWilliams, Stinson's cellmate, told Gallardo that Stinson had confessed to killing Lofton, his common-law wife in Michigan. Gallardo further related that McWilliams stated that Stinson remarked to him that his former common-law wife, Lenora Collins of New Orleans, had died the same way Lofton had.

Contributing to the confusion emanating from the ambiguous statement made by Stinson concerning his wife in New Orleans, was a phone call Detective Gallardo received from one Linda Bridges, Ms. Lofton's sister, that she had heard that George Stinson had killed Lenora Collins of New Orleans. At first blush this statement appeared to bolster Detective Gallardo's suspicions regarding Stinson and the New Orleans murder. However, later testimony revealed that Ms. Bridges worked in New Orleans with the wife of petitioner at a fried chicken outlet. The motive of petitioner's wife in shifting the blame for the murder for which her husband was convicted is self-evident.

This information was relayed to Sergeant McKenzie of the New Orleans Police Department at several different junctures. McKenzie jotted down notes during these conversations using the word "confession" and phrase "bragged of killing his wife in New Orleans," but failed to reveal them to anyone. They were placed in the mailbox of the officers who had been in charge

of the Collins murder investigation and promptly forgotten. These notes were procured by William Campbell, the Assistant District Attorney handling this case on appeal, immediately prior to the evidentiary hearing in federal court.

Respondent would first clarify the ambiguous statement made by Stinson which petitioner has repeatedly attempted to mold into a confession. This simply cannot stand. The transcript of the evidentiary hearing held before the Honorable Marcel Livaudais, Jr., Magistrate of the United States District Court for the Eastern District of Louisiana reveals the testimony of George Stinson and Detective Gallardo regarding the content of Stinson's conversation with his cellmate, McWilliams. Testimony from this evidentiary hearing makes it clear that Stinson merely commented as to the coincidence of his common-law wife in Louisiana having died in the same way as his wife in Michigan.

Q. During your conversations with Mr. McWilliams did you ever mention your wife Leonora Collins?

A. I mentioned it to him.

Q. Did you tell Francis McWilliams anything about how she was killed?

A. Did I tell him anything about how she was killed?

Q. Right.

A. I told him that she was killed the same way Erma Jean Lofton was. (at 94).

Q. And did you ever tell him in any direct way that you had actually killed Lenora Collins?

A. I most certainly did not. (at 95).

(It must be noted that George Stinson was granted full immunity before testifying at this proceeding.)

Similarly, when the question was posed to Detective Gallardo, "Did Francis McWilliams ever tell you that Stinson told him he murdered that woman in New Orleans?" Gallardo's response was "No, Sir." (T.Tr.p. 27). In no way could a reasonable person conclude that these statements amount to a confession by Stinson to killing Collins, and petitioner should be admonished as to the continued use of this deceptive term.

Respondent would next address petitioner's contention that this case involves significant prosecutorial misconduct. This assertion is ludicrous. First, Sergeant McKenzie transcribed his notes and placed them where he assumed they would be found by the officers originally assigned to the case. Second, the District Attorney's Office had no knowledge of these notes until Mr. Campbell went to the police station and discovered the untouched notes himself. The facts simply do not amount to a post-conviction suppression of evidence. Further, as this Court held in Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568 (1972), the prosecution is not required to supply the defense with "a complete and detailed accounting . . . of all police investigatory work on a case."

Finally, these events cannot be construed to have been material or to have created a reasonable doubt as to the guilt of Ronald Monroe, in light of the strength of the evidence presented to the jury from which his verdict was rendered. In Agurs, supra, this Court explained the application of the principle underlying Brady, stating that it is the "character" of the undisclosed evidence which determines the obligation to disclose it. Id., 427 U.S. at 112; 90 S.Ct. at 2401. Logically, the

reliability of evidence, in some instances, is relevant to determine whether it is of a character discoverable under Brady. However, the obvious lack of reliability of information which appeared superficially to be favorable to the defense, must diminish the state's duty of disclosure.

Clearly, the information involved here had its source in rumor and innuendo and nothing more. Rumors were started independently by McWilliams, on the one hand, and Joanne Monroe, on the other hand. Both these persons had an interest in starting the rumor that Stinson, not Monroe, killed Collins in New Orleans. A convoluted chain of events was begun by the rumors. Repetitions and transmittals of the rumors caused their reinterpretation and embellishment. Eventually, the coincidence of Gallardo's hearing from independent sources, (Bridges, who repeated the rumor started by Joanne Monroe, and McWilliams, who misinterpreted what Stinson told him and believed that his transmittal of his version of Stinson's comment would lessen his own sentence), led Gallardo to credit the rumors. He relayed the information to McKenzie who misunderstood it and did not know its source. McKenzie's notes of the call reflect this misunderstanding of the content of the rumors started by persons who had an interest in starting them.

Respondent submits, and a thorough examination of the evidence produced at the hearing confirms, that the undisclosed information about Stinson was of the weakest type possible. It cannot be concluded that the State of Louisiana unlawfully suppressed evidence which produced a reasonable doubt as to the guilt of Ronald Monroe.

Since there has been no Brady violation, the petitioner is not entitled to a third trial. Instead, petitioner's remedy is a hearing on his motion for a new trial based on newly discovered evidence as outlined in Louisiana Code of Criminal Procedure Article 851.

Petitioner complains that the state court has already refused him a new trial based on the so-called Stinson confession and that sending him back to state court for relief prejudices his rights to a fair adjudication of his claim. However, as pointed out by the Fifth Circuit in its decision on this matter, **"Because an additional state hearing is to be held, in which all of the information will be considered, there is no possibility that Monroe's rights will be prejudiced."** In its reference to "all" of the information, the Fifth Circuit noted that when the state court heard petitioner's motion for new trial, it did not have all the information that was presented to the Fifth Circuit at the evidentiary hearing.

In the case at bar, the factual basis of petitioner's federal habeas application is much different from and stronger than that upon which the state court made its determination.

In the state court, petitioner alleged only that the state had received information regarding a so-called "confession" to the crime which petitioner committed,by an inmate in Michigan. However, as emphasized by the District Court, the state court had no knowledge of the existence of notes confirming the state's receipt of this information. Nor did the state court have the benefit of inspecting the content of the notes recording the

receipt of the information. [Findings & Conclusions, p. 9]. The existence of these notes (Exhibit 5 Evid.Hrng.) was confirmed only when the prosecution complied with petitioner's subpoena duces tecum prior to the evidentiary hearing in the United States District Court and after filing of the habeas application. Additionally, the state court did not hear New Orleans Police Officer McKenzie's testimony as to his actions following his receipt of the Stinson information:

> "Because the state court has not been afforded the opportunity to consider all the evidence in this matter, petitioner's claim has not been fairly presented to the state court and that court has not had an opportunity to examine the same claim now before this court."

The Fifth Circuit in Burns v. Estelle, 695 F.2d 847 (1983) stated: "For the claim to be exhausted, the state court system must have been apprised of the facts and the legal theory upon which petitioner bases his assertion." 695 F.2d at 849 (Emphasis added).

Furthermore, the court stated "We believe that the factual bases underlying petitioner's federal claim are significantly different from those underlying his state claim and, therefore, require a finding that Burns has not exhausted his state remedies." 695 at 850.

The Fifth Circuit reaffirmed the exhaustion requirement in a later case. In Brown v. Estelle, 701 F.2d 494 (1983), the court explained the exhaustion requirement:

> "The state courts must have an opportunity to pass on the claim in light of the full record and where the factual basis for a claim was not presented to the state courts, the claim is unexhausted. Where a federal habeas petitioner presents newly discovered evidence or other evidence not before the state court such as to place the case in a significantly different and stronger evidentiary posture than it was when the state court considered it, the state court must be given an opportunity to consider the evidence." (Emphasis added.) 701 F.2d at 495.

Petitioner's rights will not be prejudiced by this Court's respect of the comity between federal and state court.

Ronald Monroe in his petition relies on a 1938 case involving bankruptcy to support his contention that the doctrines of collateral estoppel and res judicata would be violated were this case to be reheard in state court. In Stoll v. Gottlieb, 305 U.S. 165, it was contended "that the ruling below disregarded decrees of the Court of the United States. . ." at 167. There is no issue here as to a state court disregarding a federal decree. In the instant case, the Fifth Circuit has affirmed the District Court's order that the state court afford Ronald Monroe a new hearing on his motion for a new trial. A state court can hardly do damage to the doctrines of res judicata and collateral estoppel by complying with the order of a federal court.

Petitioner at page 11 of his brief states, "The precise issue in this case has never been addressed by this Court. . ." Yet on page 14, the petitioner refers to "precedent." Petitioner's initial observaiton is correct. Brady is not ap-

plicable here as precendent and as such petitioner should not be granted a new trial by this Court. Brady is founded on the idea that a defendant is entitled to a fair trial and that the prosecution should not contrive to deprive a defendant of his ability to receive a fair trial by the suppression of exculpatory material. The fact remains that Ronald Monroe did receive a fair trial.

In Agurs, supra, at 2399, this Court states:

> "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."

Petitioner further contends that to remand this case to state court for a hearing on a motion for a new trial would encourage suppression of exculpatory evidence by prosecutors. This is hardly the case in light of the fact that the state court may grant petitioner a new trial after the court hearing on the motion for a new trial. Such a possibility is most unpalatable to the prosecution. As such, petitioner is afforded adequate protection at the state court level.

II.

Petitioner contends that certiorari should be granted to resolve a conflict between the circuits regarding the issue of whether a "death qualified" jury is predisposed to favor the prosecution on the issue of guilt and is unrepresentative of the community as a whole.

Respondent would first point out that this "conflict" lies with one circuit and one circuit only - the Eighth Circuit Court of Appeals. In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the Eighth Circuit, in a borderline 5-4 decision, trailing an adament dissent, held that a capital jury, with jurors who hold absolute scruples against the death penalty excluded for cause, violated the defendant's Sixth Amendment right to a jury composed of a cross-sectional representation of a given community. The Court went further to conclude that, based upon the evidence before the District Court, death qualified juries are more conviction prone than a normal criminal jury.

This legal aberration cannot stand. The Fourth, Fifth, Seventh and Eleventh Circuits have pondered this very issue and realistically concluded that the exclusion of Witherspoon excludable jurors did not create a conviction-prone jury in violation of due process and the right to a jury selected from a fair cross-section of the community. Keeten v. Garrison, 742 F.2d 129 (4th Cir.1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir.1981); Rowan v. Owens, 752 F.2d 1186 (7th Cir.1984); Spencer v. Zant, 715 F.2d 1562 (11th Cir.1983).

The Fourth Circuit consolidated four habeas corpus petitions to resolve the sole issue of the constitutionality of death qualified juries at the guilt-innocence phase of capital trials. These petitioners urged that jurors opposed to the death penalty comprise a distinctive group in the community whose exclusion violates the Sixth Amendment. The Fourth Circuit, citing Lockett v. Ohio, 438 U.S. 586, 596-97, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978), disagreed:

> "Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case. The state as well as the defendant has legitimate and vital interests at stake at both the guilt and penalty stages of a capital case."

The four petitioners in Keeten, supra, similarly urged that the death qualification process impermissibly created conviction-prone juries in violation of the Fourtheenth Amendment's Due Process Clause. The U. S. Fourth Circuit Court of Appeals could find no merit in this contention, "The fact that a death qualified jury may be more conviction prone than one which includes jurors strongly opposed to the death penalty does not demonstrate which jury is impartial." 742 F.2d at 134. Borrowing language from the Fifth Circuit Spinkellink v. Wainwright decision, the Court continued, "Rather 'it indicates only that a death qualified jury might favor the prosecutior and that a nondeath-qualified jury might favor the defendant.'" 578 F.2d at 594.

In denying relief to these four petitioners, the Fourth Circuit stated that these petitioners were effectively stating that they had a constitutional right to a jury more likely to find them innocent than a death qualified jury. The Circuit Judges concluded in toto:* "Because petitioners are entitled only to an impartial jury, we conclude that the exclusion

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*/ Judge Butzner concurred with I and II and dissented from Part II, not relevant to this argument.

of WE's from their juries did not violate their rights under the due process clause."

The United States Court of Appeals for the Fifth Circuit, the jurisdiction from which this case has evolved, has consistently rejected the argument petitioner seeks to raise before this Honorable Court. Smith v. Balkcom, 660 F.2d 573 (5th Cir.1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). This Court has specifically held that the exclusion for cause of veniremen so unequivocally opposed to the death penalty that they would not follow the law on the subject was not violative of the constitutional right to an impartial jury. Smith v. Balkcom, 660 F.2d at 578. Circuit Judge Hill explained:

> "All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated--i.e. those who, in spite of the evidence, would automatically vote to convict to impose the death penalty or automatically vote to acquit or impose a life sentence. The guarantee of impartiality cannot mean that the state has a right to present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisonment. . ." Smith, at 579.

The Fifth Circuit unanimously concluded that the Constitution does not prohibit this judgment.

With regard to the issue of whether a death qualified jury is unrepresentative of the community as a whole, the Fifth

Circuit reasoned that any elimination of prospective jurors who are disqualified potentially impairs the achievement of a true cross-section on the particular jury. "Nevertheless, it must be remembered that a jury which reflects a fair cross-section of the community is a goal that is never to be achieved at the cost of leaving on the jury those veniremen who are legitimately disqualified." Smith, at 582.

The United States Court of Appeals for the Seventh Circuit resolved the unique issue of whether a "death screened" jury in a non-capital case was more likely to convict than an ordinary jury. The Court reasoned:

> "The pertinent question, however, is not whether a death screened jury is less partial to defendants, as it no doubt is, but whether it is likely to convict innocent people. If a death screened jury were thought to be so bloodthirsty as to be likely to convict the innocent, we very much doubt that such juries would be allowed in capital cases. But, if such juries just are more likely than other juries to convict the guilty, and thus to mediate impartially between the prosecution and the defense, we do not see how Rowan's right to due process of law could have been infringed." Rowan, supra, at 1190, 1191.

The Court concluded adamantly that Rowan had a right to a fair jury, not to a jury slanted in favor of guilty defendants.

In Spencer v. Zant, 715 F.2d 1562 (11th Cir.1983), the Eleventh Circuit dismissed petitioner's argument that he was denied his Sixth Amendment right to a representative jury from

a fair cross-section of the community because those who opposed the death penalty were excluded. The Eleventh Circuit rejected this argument as not consistent with law in that circuit, without discussion.

The Circuits faced with the issue of whether a death qualified jury is predisposed to favor the prosecution and is unrepresentative of the community as a whole, have unanimously rejected the proposition. Petitioner contends that in Witherspoon, this Court left the door open for a defendant to establish that the jury in his case was less neutral with respect to guilt. 391 U.S. at 520 n. 18. Petitioner argues that in the contradictory Eighth Circuit decision of Grigsby v. Mabry, supra, Grigsby closed that door through the use of statistical studies by showing that death qualified juries are more conviction prone than normal criminal juries. Respondent would iterate that the unfortunate Grigsby decision hung on the vote of one judge.

Judge Gibson, writing vigorously for the Grigsby dissent, stated, "The case before us essentially involves the refusal of such jurors to follow Arkansas law and consider the full range of penalties it provides, specifically the death penalty. As the Sixth Amendment does not require the representation of such jurors, we respectfully dissent." Grigsby, 758 at 244.

Judge Gibson noted that the Supreme Court has found only a Sixth Amendment right to have a jury selected from a representative cross-section. "The court today goes to extreme lengths to hold that a cross-sectional requirement applies to

petit juries as well as to venires or panels." at 144. Judge Gibson went on to berate his court's majority decision as in conflict with the law of his circuit, as stated in Pope v. United States, 372 F.2d 710 (5th Cir.1967), vacated on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968).

In Pope, Judge (now Justice of this Highest Court) Blackmon considered the jury selection process and repelled the argument that the exclusion of persons opposed to the death penalty "served improperly to produce a panel which was something less than representative of the community." Pope v. United States, 372 F.2d at 725, as quoted in Grigsby v. Mabry, 758 F.2d at 244. The Eighth Circuit in Pope concluded that the "point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." Supra at 726. Judge Gibson further chided the Grigsby majority, "The court today thus blurs the distinction between jury panels and actual juries, in contravention of reality and precedent." 758 at 244.

Judge Gibson argued that the Grigsby majority, in framing the issue as whether "the evidence supported the district court's finding that a jury with WEs stricken for cause is a conviction prone jury," "leaps over and summarily assume(s) what is not true: that WEs are a distinctive group." 758 F.2d at 245. Cognizable classes have been said to include economic, social, religious, racial, political and geographical groups of the community. Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946), cited in Grigsby at 245.

Judge Gibson stressed the absurdity of his court's conclusion that WEs are a distinctive group: (at 245 & 246)

> "The court today, however, enters uncharted waters when it recognizes attitudes or opinions as sufficient to create a distinctive group. Attitudes or opinions, unlike the characteristics that underlie recognized cross-sectional groups, may change rapidly, whimsically, and without objective manifestation.
>
> "However, while individuals may be classified according to their expressed attitudes, the constitutional issue is whether such classification is durable enough and objective enough to create a recognizable group. If a jury panel were questioned closely enough, a great many additional classes might emerge. It would be absurd, however, to suggest that the Sixth Amendment would prevent the exclusion for cause of each such class."

Judge Gibson concluded that a distinctive group should have some recognition, some characteristic outside the narrow confines of the courtroom. **"A group of jurors who during voir dire examination in a criminal case express a particular attitude as to capital punishment does not meet this test." at 247.**

The dissent next attacked the court's holding that death qualified juries are conviction prone. Quoting a long line of United States Supreme Court cases Judge Gibson echoed that **"a representative jury does not include the jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." at 247.** See Adams v. Texas, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); Lockett v.

Ohio, 438 U.S. 586, 596, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978).

The dissent continued: "The court thus apparently holds that impartiality under the Sixth Amendment requires a balancing on the jury as a whole of the jurors attitudes regarding the death penalty. The court's first error in this analysis lies in assuming that partiality as a legal concept is proven when factually it can be shown that juries with WEs removed are more conviction prone. In rejecting the majority court's hypothesis, Judge Gibson wrote:

> "To understand legal impartiality we may look either to the individual jurors or to the jury as a whole. If we look to the former, it is obvious that all jurors undoubtedly come to their task with a number of attitudes, opinions and 'biases' that may bear on the way they will view the trial. The crucial question is whether such views prevent them from taking and following their oath to consider and decide the facts impartially and conscientiously apply the law as charged by the court." at 249.

The dissent declined to enter into a detailed analysis of the "door-closing" Grigsby statistical studies: "It is enough to generally observe that an empirical study, no matter how carefully conducted, simply cannot duplicate accurately the proceedings in a courtroom under which a jury is selected and sworn to try the issues in a criminal case. The responsibilities placed on jurors in such circumstances are sobering and have a solemn impact upon them." at 248 FN 7.

Petitioner argues that because he possessed statistical data similar to that presented in Grigsby, he should have been allowed to present it to the United States District Court for the Eastern District of Louisiana and that a hearing should have been held. In upholding the Eastern District Decision, Judge Reavley of the Fifth Circuit Court of Appeals noted, "In this case, the court reviewed the findings of the state court and saw no reason for a separate evidentiary hearing. This denial was within its discretion under 28 U.S.C. § 2254(d) (1982)." Monroe v. Blackburn, NO. 84-3381, December 4, 1984.

In sum, petitioner requests that this Honorable Court grant certiorari to resolve the issues of whether death qualified juries are predisposed to favor the prosecution and are unrepresentative of the community as a whole. Respondent contends that the conflict lies within the Eighth Circuit and the Eighth Circuit must resolve its own inner strife. Currently the 5-4 holding in Grigsby stands conspicuously alone, juxtaposed against a scathing dissent by its own members as well as four different panels of circuit courts that have unanimously concluded that as a matter of law Witherspoon exclusions do no fail to produce impartial juries. This conviction should be upheld as sound in the jurisdiction from which it evolved.

III.

Petitioner maintains that defense counsel was so overburdened by a full docket that "he could not possibly" have rendered effective assistance of counsel as mandated by the Constitution. Basing a decision concerning ineffective assistance of counsel on such an assumption is prohibited by United

States v. Cronic, 104 S.Ct. 2039 (1984), which mandates that a claim of ineffective assistance of counsel must be supported by "specific errors made by trial counsel." (Cronic, at 2051). A presumption that the defense could not possibly have rendered effective assistance of counsel is allowed in only the most extreme cases, including a complete denial of appointment of counsel, [Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d (1963)], denial of the right of effective cross-examination, [Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)], and refusal by the trial court to allow the defendant to consult with his attorney during a recess, [Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)]. Ronald Monroe fails to allege an error of such magnitude. Petitioner "can therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel" United States v. Cronic, supra, at 2051.

Additionally, a presumption exists as to the competence of the defense counsel at trial:

> "Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. The burden of demonstrating the contrary is on his former clients." Cronic, supra, fn 23 at 2045, citing Mattheson v. United States, 518 F.2d 1245, 1246 (C/A 71975).

The petitioner places great weight on the fact that defense counsel during the same month that he tried Ronald Monroe's case, tried two other capital cases and prepared for yet

another capital case as well as several felonies. Defense counsel John Lawrence, in reference to his workload during the time of Ronald Monroe's trial, stated, "It damned near killed me." (Lawrence Affidavit) Petitioner offers this statement in support of his contention that John Lawrence was so overburdened that there was no way that he could have adequately represented Ronald Monroe. Lawrence's statement would more likely indicate that he worked extremely hard on all his capital cases that month, including that of Ronald Monroe. To have done otherwise would not have "damned near killed" defense counsel.

Petitioner complains that John Lawrence failed to conduct even the simplest investigation in preparation for petitioner's sentencing hearing, citing Lawrence's failure to obtain and present testimony as to the petitioner's good character. As noted by the Fifth Circuit in its decision, though Lawrence did present a general argument against the death penalty to a Witherspoon-qualified jury, he "also put on evidence of Monroe's lack of a criminal record, his age and his intoxication on the night of the crime." It was within defense counsel's reasonable judgment to determine what information would have the most positive effect on members of the jury.

Petitioner's complaint of a dirth of character witnesses does not support his ineffectiveness claim. This Court in Strickland v. Washington, 104 S.Ct. 2052 (1984), at 2059, refers to findings of the trial court in Strickland which the court upheld:

> "The [trial] court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person. . ."

After convicting Ronald Monroe of stabbing a woman to death in the presence of her children, it can hardly be expected that members of that same jury would be swayed by a useless parade of individuals mouthing the praises of a convicted murderer.

Ronald Monroe's best character witness, his mother, did take the stand, yet even her testimony could not prevent the imposition of the death penalty.

Under the facts of this case, defense counsel's representation satisfied petitioner's Sixth Amendment right to counsel.

Lastly, petitioner complains of his counsel's failure to investigate the possibility that George Stinson committed the murder. There was no indication before or during the trial that George Stinson was a suspect worth investigating. After all, the state had two eyewitnesses to the crime. This Court in Strickland, surpa, at 2061, said that the scope of counsel's duty to investigate, ". . . depends on such facts as the strength of the government's case. . ." The two youngsters who witnessed the death of their mother gave the state a very strong case indeed. This Court in Strickland, supra, at 2061, refers

to the Fifth Circuit's observation that "**counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight. . .**" Statements made by Stinson to his Michigan cellmate, whatever their motive, did not come to light until well after the conclusion of Monroe's trial. This Court in Strickland, **supra, at 2065,** stated, "**A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.**"

Petitioner has failed to show that John Lawrence's representation of petitioner at trial fell below the standard of competent counsel as mandated by the Sixth Amendment. Furthermore, petitioner has failed to show any substantial prejudice suffered as a direct result of errors made by counsel at trial.

CONCLUSION

Based on the foregoing argument and jurisprudence, respondent requests that this Court deny petitioner request for a writ of certiorari.

Respectfully submitted,

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Assistant District Attorney

EDITOR'S NOTE

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No. 84 - 6667

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

v.

FRANK BLACKBURN, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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No. 84 - 6667

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RONALD S. MONROE, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
PETITIONER'S REPLY BRIEF

The most remarkable aspect of Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br.") is its utter failure to address the conclusion of the courts below that the State of Louisiana suppressed exculpatory evidence that "creates a reasonable doubt [as to Monroe's guilt] that did not otherwise exist." (Appendix B at 5).[1/] After a full and fair evidentiary hearing, the Magistrate recommended, as a matter of both fact and law, that a Brady violation had occurred (Appendix A); after a de novo review of the facts, the District Court so held (Appendix B); and the Fifth Circuit affirmed (Appendix E). But respondent -- who never appealed from the judgment of the District Court --

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1/ References are to the appendices attached to Monroe's Petition for a Writ of Certiorari dated April 15, 1985.

now almost totally ignores that judgment, not to mention the Magistrate's report. Instead, respondent simply unilaterally asserts that, on his version of the facts, a Brady violation should not have been found. And on the issue as to which petitioner has requested a writ of certiorari, respondent has said nothing to show why the scope of the remedy for a post-conviction Brady violation should be less than for all other Brady violations.

I

THE BRADY ISSUE

A. The State Ignores the Findings of Fact Below.

The State argues that petitioner is not entitled to any remedy, let alone a new trial, since there was no Brady violation in the first place. Resp. Br. at 5. "[A] thorough examination of the evidence produced at the hearing" before the Magistrate, the State asserts, could not lead to the conclusion "that the State of Louisiana unlawfully suppressed evidence which produced a reasonable doubt as to the guilt of Ronald Monroe." Resp. Br. at 12. The State does not bother mentioning, however, that after a "careful evaluation of the record" (Appendix B at 6), the District Court concluded just that, as had the Magistrate earlier.[2/]

2/ The State does not -- because it cannot -- show why the findings of fact in the Magistrate's report, adopted by the District Court after a de novo review, were "clearly erroneous." Griffin v. Missouri Pacific Railroad Co., 413 F.2d 9, 12-13 (5th Cir. 1969). In any event, the State may not here attack the judgment of the District

(Continued)

(1) Reasonable Doubt as to Guilt.

In reaching its conclusion that the suppressed evidence "creates a reasonable doubt as to Monroe's guilt that did not previously exist," the District Court made at least three crucial points: (i) that no physical evidence linked Monroe to the murder, (ii) that "the assertion that Stinson committed the murder [is] plausible," and (iii) that the only evidence directly linking Monroe to the murder -- "the eyewitness testimony of the victim's two children" -- is marred by "disturbing" aspects. (Appendix B at 5-6). The legal ruling of the Court of Appeals was premised on its acceptance of these findings.

The Magistrate stated, in a report which the District Court adopted as its own findings and conclusions, "It is hard to imagine evidence more potentially favorable to a defendant than the possibility of another person's confession to the crime coupled with a suggestion of a second source of information in support." (Appendix A at 8). For that reason, as supported by the close analysis of the facts in both the Magistrate's report (Appendix A) and the District Court's Memorandum Opinion (Appendix B), the evidence is material because "its suppression undermines confidence in the outcome of the trial." United States v. Bagley 53 U.S.L.W. 5084, 5087 (1985).

(Continued)

Court, because it failed to cross-appeal to the Fifth Circuit. (Appendix E at 960).

(2) Suppression.

Not satisfied to challenge only the materiality of the evidence, the State also asserts that "[t]he facts simply do not amount to a post-conviction suppression of evidence." Resp. Br. at 11. That assertion is so overwhelmingly contradicted by the undisputed evidence that the State itself has never made it before -- not ever to any one of the three federal tribunals below.

And suppression there was, as a matter of both fact and law. The Magistrate's statement on the subject is unimpeachable:

> It is undisputed that State authorities suppressed the evidence concerning George Stinson that they received from Detective Gallardo. Respondent has admitted that neither Ronald Monroe, his attorneys, nor anyone acting on Monroe's behalf was ever informed by anyone acting on behalf of the State of any of this information . . . [The] fact that the District Attorney's office may not have known of the information communicated by Detective Gallardo to the Police Department is immaterial. The obligation to disclose attaches whenever the police in the prosecuting jurisdiction possess exculpatory evidence. United States v. Agurs, 427 U.S. 97, 110 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972); Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980)

* * *

The State's argument boils down to the assertion that it may unilaterally suppress exculpatory evidence which it determines is not credible. The whole point of Brady, Agurs, and most recently Bagley is to the contrary. In the words of the Louisiana Supreme Court:

> The Brady rules of disclosure apply not just to information favorable to the accused which the state itself believes to be credible, but to any material information that is favorable to the accused. . . . If the prosecution could under the aegis of Brady, disclose only that information favorable to the accused which it found to be believable, then the doctrine would become meaningless.

State v. Brooks, 386 So. 2d 1348, 1351 (1980) (emphasis in original).

B. The Appropriate Remedy Here Is a New Trial.

The State argues that a new trial is an inappropriate remedy since Monroe received a fair trial when it took place, even if thereafter the State suppressed material exculpatory evidence. See Resp. Br. at 16. But the State can put forth that argument only by disregarding the two crucial elements of the Brady violation: the findings of both the materiality of the exculpatory evidence and its suppression.

In finding a Brady violation, the District Court essentially found that a fair trial now before a reasonable jury which could evaluate the full range of evidence -- heretofore unavailable -- would not necessarily result in a conviction of Monroe. After a federal court has found that a reasonable jury might acquit Monroe on the present record because a reasonable doubt exists as to his guilt, there is no room left for the State to dispute the federal court's finding on that factual issue or to deny Monroe a new trial. Because Monroe's conviction is no longer based on evidence showing guilt beyond a reasonable doubt, it is inconsistent with the federal Constitution. Jackson v. Virigina, 443 U.S. 307, 309 (1979).

Indeed, this Court has recently reaffirmed the principle that a Brady claim is not to be decided by the same rigorous standards which might apply on a motion for a new trial based on newly discovered evidence obtained from a neutral source: "The standard of materiality applicable in

the absence of a specific Brady request is . . . stricter than the harmless-error standard but more lenient to the defense than the newly discovered evidence standard." United States v. Bagley, 53 U.S.L.W. 5084, 5087 (1985). Thus, the state court may not nullify the Brady violation found here by replacing federal constitutional standards with state standards.

Any other rule would destroy the prosecutor's motive to disclose exculpatory evidence, and reduce the judicial process to "a sporting contest." All the courts below have found that the State suppressed evidence that it had a duty to disclose. The vice of their rulings -- which we ask this Court to correct -- is that, despite the finding of suppression, the remedy afforded below negates any prosecutorial incentive to disclose by leaving the government in no worse position than if it had lived up to its solemn obligation to see that justice is done.

C. A New Trial Is the Appropriate Remedy Under the Exhaustion Doctrine.

When the State finally gets around to addressing the issue of the appropriate remedy for the Brady violation here, its main argument is that the remedy of a motion for a new trial is appropriate on the basis of the exhaustion doctrine. Resp. Br. at 13-15. This argument is without merit.

Monroe's state court petitions set forth the facts on which he now relies, and alleged a Brady violation.

(D.1A-9).[3/] His requests for discovery in state court were opposed by the state, and were denied.

On January 4, 1984 upon granting a stay of execution, and directing an evidentiary hearing, the District Court made it unequivocally clear that Monroe had exhausted his state court remedies. (D. 12-2; R. 21).[4/] Then, after the State's production of the McKenzie notes and an evidentiary hearing, the Magistrate, reviewed the prior proceedings in the state courts and came to exactly the same conclusion: "[P]etitioner has exhausted his state remedies" (Appendix A at 2). Thereafter, the District Court adopted those findings and conclusions "as its own." (Appendix B at 1). In affirming the District Court's holding, the Fifth Circuit stated that Monroe "filed this petition for habeus corpus," "[a]fter exhausting his state remedies . . . ." (Appendix E at 959).

The courts below were correct. The McKenzie notes, whose belated production the State now relies on to argue lack of exhaustion, were simply one additional piece of factual evidence considered in the Federal proceeding, and they merely confirmed what the State had never denied: that Sergeant Gallardo -- as related in his sworn, uncontested, affidavit presented to the state court -- called the New Orleans Police Department and reported the Stinson confession.

The exhaustion doctrine only requires a petitioner to exhaust all claims, not all evidence. See, e.g., Townsend

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3/ D.1A-9 refers to Document Number 1A of the Record on Appeal at page 9.

4/ "R.21" refers to appellant's Record Excerpts at page 21.

v. Sain, 372 U.S. 293, 317 (1963). Thus, the emergence of an additional fact at the federal hearing does not require a remand to state court. See, Picard v. Connor, 404 U.S. 270, 277 (1971) ("Obviously there are instances in which 'the ultimate question for disposition,' . . . will be the same despite variations in the legal theory or factual allegations urged in its support." (emphasis added)).

The cases cited by the State do not hold to the contrary. In those cases, unlike this one, the claims or factual allegations raised in federal court had never been presented to the state court. See, Burns v. Estelle, 695 F.2d 847, 850 (5th Cir. 1983) ("factual bases underlying petitioner's federal claim are significantly different from those underlying his state claim."); Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983) (three affidavits introduced in federal proceeding "added some substantiation to contentions which previously had no serious cooroboration.")

In any event, the State has long since waived its right to argue exhaustion. The State let Monroe come within eight hours of death, without ever bothering to check its own files where evidence tending to show Monroe's innocence sat untouched. It finally produced the evidence only in response to Monroe's subpoena duces tecum. It then made no attempt to remand the case to state court on exhaustion grounds, either before the Magistrate or District Court, but proceeded with the federal hearing never raising the exhaustion issue. Only after the District Court ruled against the State by finding that it violated Monroe's constitutional rights did the State suggest "exhaustion" as a ground for going back to square one.

II

THE GRIGSBY ISSUE

On the issue of whether a "death-qualified" jury is predisposed to favor the prosecution at the guilt phase of the trial and is unrepresentative of the community as a whole, the State does not -- because it cannot -- deny that a conflict in the circuits exists and that this is a current issue of exceptional public importance. The sheer number of circuits which has addressed the issue shows the diversity of legal opinion it has evoked. Indeed, since petitioner filed his petition for a writ of certiorari, yet another circuit has shown its interest. For this Court's information, we file herewith a supplementary appendix of the relevant portions of a transcript in which the Tenth Circuit requested special argument on this issue.

In view of this issue's complexities, we think that the State's argument on the merits is inappropriate in the context of a petition for a writ of certiorari. We point, however, to two inaccuracies in the State's brief.

First, the State's argument is premised on the inaccurate assumption that petitioner seeks to have included on his jury prospective jurors who, to avoid the possibility of the death penalty, would never vote to convict. In fact, petitioner agrees that such people, known as "nullifiers," are properly excluded from both the guilt/innocence phase and the sentencing phase of a jury in a capital trial. Petitioner's claim is simply that the jury should not exclude prospective jurors who state under oath that, although unable to apply the death penalty at the sentencing phase, they <u>are</u>

capable of impartially judging the defendant's guilt or innocence.

Second, the State cites the Fifth Circuit's statement that the District Court "reviewed the findings of the state court and saw no reason for a separate evidentiary hearing." Resp. Br. at 25 quoting Appendix E at 961. But there were, in fact, no findings of the state court. The state court rejected the substantial documentary evidence proffered by petitioner without considering it and refused to allow an expert witness to testify. Similarly, the District Court summarily rejected the claim without a hearing. (D. 12 at 2-8; R. 21-27). Petitioner seeks simply the opportunity to prove what this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) said he is entitled to prove, namely that prospective jurors who are firmly opposed to the death penalty form a constitutionally cognizable group for the purposes of implementing the right to trial by a fair cross-section of the community under the Sixth Amendment.

III

INEFFECTIVENESS OF COUNSEL

The State asks this Court not to grant a writ of certiorari to determine whether petitioner was provided effective assistance of counsel because the claim is not supported by "specific errors made by trial counsel." Resp. Br. at 26. But petitioner has pointed to specific errors of major proportion.

First, petitioner's trial counsel knew that Collins' estranged husband Stinson might have murdered her but never actually investigated the possibility. The State denies that

this omission constituted ineffectiveness in light of the strength of the State's case. Resp. Br. at 28-29. But, since three federal tribunals have now found plausible the possibility that Stinson, not Monroe, in fact committed the murder, it is clear that vigorous investigation by defense counsel might have turned up evidence tending to show Monroe's innocence. In an adversarial system of justice, defense counsel in a capital case is ineffective if he does not pursue a substantial theory which might cast a reasonable doubt as to his client's guilt.

Second, petitioner's trial counsel, overlooking a wealth of available material, failed to either collect or present any character evidence showing why Monroe as an individual did not deserve to die. The State replies that the same jury which just convicted petitioner could "hardly be expected . . . [to] be swayed by a useless parade of individuals mouthing the praises of a convicted murderer," anyway. Resp. Br. at 28. But constitutional standards require a new and independent inquiry at the sentencing phase. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1977). Monroe was entitled to the jury's "particularized consideration of relevant aspects of [his] character and record" and to the jury's exposure to "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976). But because of trial counsel's abstract and academic presentation, Monroe was denied a meaningful and personal plea for his life.

In particular, petitioner's defense counsel argued to a Witherspoon-qualified jury that the death penalty should

not be inflicted under any circumstances. The argument was foredoomed to lose, since the jurors were seated only after rejecting that argument.

In short, petitioner asks this Court to grant the writ to determine whether counsel in a capital case is constitutionally ineffective when he leaves his client with virtually no defense whatever on either guilt or punishment, especially where, as here, compelling defenses were indeed available.

CONCLUSION

The petition for a writ of certiorari should be granted.

July 29, 1985

Respectfully submitted,

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SUPPELEMNTARY APPENDIX

Excerpts from Transcript of
Proceedings held before the
Tenth Circuit on April 17, 1985

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES COURTHOUSE

CHARLES TROY COLEMAN,

Petitioner-Appellant,

vs. No. 85-1094

JOHN W. BROWN, Warden,
Oklahoma State Penitentiary
at McAlester, Oklahoma;
LARRY MEACHUM, Director,
Department of Corrections,
State of Oklahoma; and
THE ATTORNEY GENERAL OF
THE STATE OF OKLAHOMA,

Respondents-Appellees.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings on the above-entitled case before the United States Court of Appeals, Tenth Circuit, sitting in Cheyenne, Wyoming, before the Honorable Chief Judge William J. Holloway, Jr., the Honorable James K. Logan, and the Honorable Stephanie K. Seymour, commencing on April 17, 1985.

Court Reporter: C. Frederick Cole, RPR
Official Court Reporter
District of Wyoming
Cheyenne, Wyoming

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I N D E X

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Mr. Munson - 65

P R O C E E D I N G S

(Hearing proceedings commenced 10:45 a.m., April 17, 1985.)

CHIEF JUDGE HOLLOWAY: Be seated.

Because of the very serious nature of the case we have as you know made arrangements for the reporter to assist us and to have this argument transcribed.

I mentioned before, and I am not sure, Mr. Lee, that you were there, that we want to be assured that you each know that we have a full hour, although for convenience of yourselves and the court, the case was calendared as a B case, it is being treated as a full A case with a full argument of the full hour, and we will entertain motion for more time if need be, because we view the case very seriously with you.

You may proceed in the Coleman case.

MR. MUNSON: Thank you.

This matter comes on appeal before this court upon a denial of a petition for writ of habeas corpus pursuant to 28 USC 2254.

CHIEF JUDGE HOLLOWAY: Would you permit me to interrupt you just a minute?

MR. MUNSON: Yes, sir.

provided late with a preliminary hearing transcript in this particular case. I think that --

CHIEF JUDGE HOLLOWAY: You think he had that in advance of trial?

MR. LEE: I'm sure he did, Your Honor, although I don't think the record reflects. All we know is that Mr. Pearson never complained of it. And in view of the fact that Mr. Pearson seemed to complain about everything, I feel sure that that would have been in the record.

I think the record shows that the preliminary hearing transcript he said he was just given is the one from Tulsa County which the prosecutor states on the record that he was going to give him, so Mr. Pearson would know what the testimony of Officer Perish, the officer in Arizona who was kidnapped by the petitioner, would testify about.

CHIEF JUDGE HOLLOWAY: Just a moment, Counsel.

(Brief pause.)

CHIEF JUDGE HOLLOWAY: The panel, we have all studied intensely on the issues you have been covering, and we are aided by your comments, but we are concerned about Grigsby.

MR. LEE: Yes, sir.

CHIEF JUDGE HOLLOWAY: And we would suggest you address that, and we will allow opposing counsel reasonable time, whatever he needs, to address that.

MR. LEE: Yes, sir.

CHIEF JUDGE HOLLOWAY: We have this morning checked, the State of Arkansas is going to file a petition for certiorari, and they have asked for an extension of time. I think in effect they are really asking the Eighth Circuit to stay their mandate in Grigsby. And as yet, though, from what information we obtained this morning from the clerk of the Eighth Circuit was, that the petition has not been filed, but that's the status of it, the latest that we have, unless you know further.

MR. LEE: No, I have no further information. As a matter of fact, I have been waiting for the Federal Reporter on Grigsby to come, and I haven't been able to find it. I have noticed there is a companion case, Ruiz versus Lockhart, which has been reported, and it refers to another case along those same lines, but I still can't find the reported case of Grigsby, although I have a copy of it.

The majority opinion in the Grigsby case specifically noted that their opinion conflicts with the opinion of three other circuits. Well, I don't know if they specifically mention the three other circuits, but they mention that it does conflict with other circuits. And we in our brief contend that it conflicts with the rulings of the Fourth Circuit, in the Keeten versus Garrison case, the Fifth Circuit case in the Smith versus Balkcom case, and the McCleskey case out of the Eleventh Circuit.

So we feel like the Eighth Circuit and the Grigsby case is wrong in their reasoning. Of course we wish the Tenth Circuit to follow the lead of the Fourth, Fifth and Eleventh Circuits for the reasons which I am about to discuss.

In the majority opinion in the Grigsby case they rely of course very heavily on a number of things, like mock court situations, public opinion polls, the Harris Poll, things like that. This same evidence was essentially reviewed by the other circuits in rejecting the same contention.

I might first initially note that in the Keeten case the Fourth Circuit stated, however, that they felt like that these polls really are inconclusive, or these studies are inconclusive and,

if anything, they show that the defendant is demanding a defendant-prone jury.

CHIEF JUDGE HOLLOWAY: Did any of the circuits, though, have the extensive record that Judge Isley had with both testimony by several experts, plus the studies?

MR. LEE: I believe at least two of those particular cases deal with those studies, specifically note those studies in their footnotes.

CHIEF JUDGE HOLLOWAY: There is in addition live testimony in Arkansas by a number of witnesses, which is cited by Judge Isley in his opinion.

MR. LEE: Yes.

CHIEF JUDGE HOLLOWAY: That's what troubles me, that we have a little difference in the record from those circuits than what we seem to have from the Eighth Circuit.

MR. LEE: Yes, I don't think any of those particular circuits specifically deal with the same testimony -- well, they all came before the Eighth Circuit.

CHIEF JUDGE HOLLOWAY: Yes.

MR. LEE: The second Grigsby case. I don't think they specifically mentioned the same

testimony. I think that it is important, however, that I don't think any of that testimony would change the rationale used by the Fourth, Fifth and Eleventh Circuit in reaching the opinion they did.

For example, they note in footnote 9 in the Keeten case, they pointed out that the 1971 Harris Poll, which is relied on by the defendant in this case, and which the Grigsby majority cited in their opinion. They stated that the Witherspoon excludable people were specifically asked the question whether or not they would vote not guilty even knowing that there would be a second chance to vote against the death penalty in the second stage.

And the poll reviewed that 56 percent of the Witherspoon excludable stated that they would still vote not guilty, because there would be a chance of the death penalty being imposed upon the defendant.

So all three of these circuits, in the Smith versus Balkcom case, they discuss the earlier cases of Spinkellink case, where as I stated the Fifth Circuit specifically stated that they think what the defendants are asking for are defendant-prone juries, and not fair and impartial ones, jurors that we feel like the state is entitled to a

jury which would follow the law.

CHIEF JUDGE HOLLOWAY: If you throw them all in don't you just get the mix, for both the plaintiff-prone and the defendant-prone, if you don't exclude them?

MR. LEE: Well, the Smith versus Balkcom court specifically stated that the extremes in both situations have to be excluded. You have to exclude jurors who state that they will automatically vote for the death penalty no matter what the case. You have to exclude the other extreme, the jurors that state that they would automatically -- is that they would be opposed to the death penalty.

And of course we know that the Witt versus Wainwright case has now changed the test. The state doesn't have to show automatically opposed, but just that it would substantially impair with the jurors' duties.

I think it is important.

CHIEF JUDGE HOLLOWAY: So that you are really now excluding a larger phase of the community under Witt, the exclusion is larger, is it not?

MR. LEE: Because you are excluding the Witherspoon excludables?

CHIEF JUDGE HOLLOWAY: Isn't the Witherspoon excludable class group enlarged after the Witt opinion?

MR. LEE: Well, I really don't think that there is really going to be that much difference. You look at the voir dire in the Witt versus the Witherspoon case, and in my view that particular juror was not going to consider the death penalty. I think in our case the jurors that were excluded by Judge Summers, and of course we know that his determination is entitled to a presumption of correctness, I think that under either test that none of those jurors were going to sit in a death penalty case.

I want to make one important point, though, about what the Fifth Circuit stated in the Smith case, because I think it is a very important point.

It said that they talked about what was called the "whimsical doubt," and they stated that if you adopt what the defendant wants, you have a jury which in the second stage the jury has been instructed not to consider anything that happened, and you are probably going to have a jury that didn't hear the evidence that took place in the first stage, if you go along with what the District

Court in the Grigsby case stated requiring two separate jurors now.

JUDGE LOGAN: The circuit didn't agree with that, did they?

MR. LEE: No, they sent it back and said it is up to Arkansas to make that decision, and presumably Arkansas couldn't make the decision.

JUDGE SEYMOUR: But, presumably, we are going to have to look at those studies and the evidence and make our own judgment about the value of them. Assume we agree with Judge Isley, and the Grigsby majority that there is value in those studies, what is the problem with the suggestion made in Grigsby that you could have one jury with extra alternate jurors who would listen to all of the evidence, and then you would do the death qualification voir dire at the end after the conviction and exclude only those who could not vote for the death penalty, and the same jury who heard the evidence would decide the penalty phase?

MR. LEE: The problem is, that I don't think the Fourteenth Amendment and the Sixth Amendment requires that ~~crime~~ [illegible] of complexity imposed on the state criminal justice system.

JUDGE SEYMOUR: Even assuming the

validity of those studies?

MR. LEE: I think those studies are studies made by people who make their decisions based on polls, based on --

JUDGE SEYMOUR: But you are disputing the validity of the studies. And that's a separate issue. I want you to assume the validity of the studies, if we should decide that the studies are sufficiently validated by the Grigsby record, assuming that, what is the problem with the suggestion made in Grigsby?

MR. LEE: Like I said I think the problem is federalism. I think that is just too complex a scheme of capital sentencing to be imposed on criminal justice --

JUDGE SEYMOUR: We could have extra alternates.

MR. LEE: -- because I think that the state has a right to have a jury which is selected from the very beginning to sit on the entire case of a defendant, and listen to all the evidence, and to state from the very beginning that they can consider all statutory options and consider all points of law which can be raised.

And I think that, particularly when you

read the Wainwright versus Witt case, I think at that time Grigsby is way out of line with what the Supreme Court right now feels. I think it is way out of line with what the Supreme Court intended in the Witherspoon decision, particularly looking at note 21 in that decision, and as I stated it is adverse with what three other circuits have decided.

JUDGE SEYMOUR: Of course Witt very much focuses on the right of a jury that will decide the case basically from the evidence, doesn't it?

MR. LEE: That's correct.

JUDGE SEYMOUR: It doesn't really deal with the two-jury system because that issue wasn't in front of it?

MR. LEE: That's correct.

JUDGE SEYMOUR: If those studies support the notion that you are not getting a fair cross selection in that sense for the guilt phase, if you exclude this class of people, then don't we really have a Sixth Amendment problem?

MR. LEE: Of course, the dissent in Grigsby pointed out that the Tenth Circuit has made probably the best definition of what constitutes a cognizable group, which if they are excluded violates the defendant's right to a cross section of

the community. The case of United States versus Test. Of course it is an en banc opinion by this court. And this circuit set forth three factors in making that decision.

And in my view, the fact that you have a group of individuals who philosophically are in agreement on that particular issue, does not mean you exclude them, that does not fit within the definition of this circuit setup, in this particular case there was a case involving the defendant alleged that people twenty-one to thirty-nine years of age were being excluded and they constituted a cognizable group in the community, and this circuit rejected that contention.

And as the dissent in Grigsby pointed out, I don't think that a grouping of people who just happened to have the same opinion about the death penalty constitute a cognizable group.

I might go back if I could.

JUDGE LOGAN: If we would petition a cognizable group now it would eliminate them.

MR. LEE: Any two people that have an agreement about a philosophical point are a cognizable group.

CHIEF JUDGE HOLLOWAY: People who

group themselves as Democrats or Republicans have views, but you couldn't have an exclusion based on political affiliation.

MR. LEE: Yes, but I think that the factors set forth by the court in the test require something more than that. I think Democrats and Republicans share a more of a community interest, which is a third factor in that test other than just people who are just randomly selected from the community, and just happen to be in agreement about this philosophical or religious point.

I think Democrats and Republicans share much more than just general -- just agreement about one particular issue. I think they are much more of a united and cognizable group.

I just want to say that as I was about to say to Judge Logan, the majority in the Smith Case specifically talks about the idea about excluding people from the jury that have not heard the first stage, and they talk about the fact, they called it a "whimsical doubt," and they feel like it would be more detrimental to a defendant to have a jury on the second stage that had not heard the evidence on the first stage.

They say the jurors in the second stage or

when they decide punishment use things, all kinds of considerations, for example, the strength of the state's case. I think it is really common knowledge that a jury is not going to be as likely to vote that a defendant receive the death penalty in the case just really is kind of weak.

JUDGE SEYMOUR: What about giving the convicted defendant the option after the conviction to decide whether he wanted to go forward with the same jury or a separate one?

MR. LEE: Again I guess it just gets back to my point before my federalism argument. I really don't -- and I don't mean to say the same thing, although I guess I just really feel like that the Sixth Amendment as applied by the Fourteenth Admendment just doesn't really require that. And there is nothing that the United States Supreme Court has said in any of their opinions, since Witherspoon, which would in any way imply that that has to be done.

JUDGE LOGAN: Counsel, let me ask this question slightly different. This discussion is assumed that if we would adopt the Grigsby result that there would have to be a new trial on Mr. Coleman. Is there such a thing as harmless error?

I mean Chapman versus California says that a lot of constitutional error can be harmless beyond a reasonable doubt.

In a case like this the evidence is incredibly overwhelming, how could any jury on a cross section on a guilt phase have come out differently than they did?

Your opposition counsel as I read the brief says that if this is a Sixth Amendment question there is no such thing as harmless error in the Sixth Amendment. Do you agree with that or is it possible for us to adopt the Grigsby result for future cases but apply a harmless error standard?

MR. LEE: Off the top of my head, I cannot think of any case which says that the harmless error could not be adopted in this case. And I would certainly request the court to do so, because obviously every death penalty case in the Eighth Circuit has been affected by the Grigsby case.

And obviously, if the Tenth Circuit adopts that same reasoning, it will affect -- I mean virtually every capital defendant raises a Witherspoon issue. And it is just in virtually every one that comes up, and it is preserved at trial.

I mean every competent defense attorney is

going to be objecting to systematic exclusion of Witherspoon excludable people. So it is preserved in every death penalty case generally.

So every death penalty is going to be affected, certainly in Oklahoma, and certainly throughout the circuit. So I would hope, and I can't think of any exceptions to the harmless error rule other than in the cases dealing with exculpatory evidence.

There is a little bit different standard due to the three types of evidence, but I can't see why in this case -- and I might kind of interject at this particular point, the voir dire reveals that the judge I think was very careful and particularly left on the jury a woman who had reservations about the death penalty, Patty McNeil, and I believe her voir dire statements are on page 110 and 112, where she states initially that she has reservations about the death penalty. But the court left her on.

And I think in view of the fact that we have only three that were excluded for that reason, and considering a review of the entire voir dire, I would hope that even if this court does accept what the Eighth Circuit has done that they will find in this particular case, with all the evidence in this

case, that it is harmless error.

JUDGE LOGAN: At least you would be entitled to a jury that would have to say that they could weigh the evidence and find guilt if that was the law, wouldn't they, even though it is a possibility later somebody would have to determine whether he lived or died?

MR. LEE: Yes.

JUDGE LOGAN: And your position I assume is that any such person would have had to vote for guilt on the evidence in this case?

MR. LEE: I'm not quite sure if I understand you.

JUDGE LOGAN: Well, this case wasn't a close case in any way, shape or form?

MR. LEE: No, sir.

JUDGE LOGAN: And in a close case Grigsby excludables might make a difference in whether there was guilt or innocence in determination, but I assume your position is no conscientious person could have found this person innocent of first degree murder?

MR. LEE: I think that in the first stage that no reasonable jury, I mean that there is no reasonable doubt as to -- look at the Jackson

versus Virginia standard or any kind of a standard like that, the Chapman versus California, that no reasonable jury could have found the verdict anything other than what they did in this case.

CHIEF JUDGE HOLLOWAY: Unless they are a Witherspoon excludable that votes not guilty to prevent the danger of a death penalty?

MR. LEE: Yes, if they are in that 56 percent that the Harris Poll referred to, the 1971 Harris Poll.

CHIEF JUDGE HOLLOWAY: What would be wrong, though, if the Witherspoon excludables were all lined up and put back in, and everybody put back in to hear the evidence on guilt?

MR. LEE: I think that's the same question Judge Seymour asked.

CHIEF JUDGE HOLLOWAY: I just don't quite see why that might not work.

MR. LEE: I mean maybe if I was in the legislature or something like that, or any of us would have been in the legislature trying to make that determination, maybe we might vote for that. But I think that the review of the federal court is much different.

CHIEF JUDGE HOLLOWAY: For balance the

jury can't be less than six?

MR. LEE: That's correct.

CHIEF JUDGE HOLLOWAY: There are quite a few that the constitution placed on all of us.

MR. LEE: That's correct.

CHIEF JUDGE HOLLOWAY: And just based on my contact myself with the criminal justice system.

MR. LEE: I really personally can't agree with them saying, "Oh, I think that there are a very lot of strong law and order people that just have a real problem with the death penalty, that would be very quick to convict people that just have a real religious problem."

And Mr. Pearson in his voir dire and in his closing argument worked real hard on that, about "Would you be willing to tell your grandchildren or your children that you sent a man to his death." And I think I really question just from my own practical standpoint as a human being and as a lawyer the validity of saying that because somebody is, I mean that these particular jurors are going to be more conviction-prone, I just -- I really don't think that Fourteenth Admendment principles should be based on that.

JUDGE SEYMOUR: That's not the argument, the argument is that somebody that believes strongly in the death penalty would be more conviction-prone. You are talking about the people that don't believe in the death penalty. And the studies allegedly show that those people are more likely to reasonably assess the evidence; isn't that the basic argument of the studies in Grigsby?

MR. LEE: That people who strongly believe in the death penalty are more likely to be prosecution-prone?

JUDGE SEYMOUR: Yes. And less likely to pay attention to constitutional issues in the course of the trial.

MR. LEE: Well, that could be possible. I think my time is up.

MR. MUNSON: If I may take just a moment, I need to comment on a couple of things that opposing counsel went through first, which I don't think are going to raise any questions. If I do, I'm sure you will ask, but just to point up we are not saying Mr. Pearson is incompetent counsel, we are saying he is ineffective counsel. I do think there is a difference there.

I think we have shown that in our briefs and

I think that is made very clear with what our claim is, because ineffective counsel is the case, the test under the Strickland case.

In regards to the comments of Mr. Pearson building a point for his client by his statements contained therein, it appears to me that that doesn't logically carry out that if Mr. Pearson is not even concerned to the point to prepare for the second stage, how is he to prepare for the appeal stage? I mean, you know, he has by his own statements got into the second stage and he certainly is not thinking about the appeals stage. I think we have to give credence to his statement about his unpreparedness, and I think that is pointed out.

JUDGE LOGAN: It gives you a better case if he decided and discussed and thought about and admitted that he thought about the penalty phase and decided he couldn't put on the family members because it wouldn't do any good, it gives you a better shot on an appeal by saying that he didn't even think about it, or he didn't have time to prepare for the appeal stage.

MR. MUNSON: I understand that, but I do think we have to give credence to the truthfulness of counsel statements that he really

did not prepare.

In regard to the alibi witness and the importance of that. As anyone who has done work in the criminal area that's correct in your investigation, and specially in regard to a alibi witness, some of the important things you talk to that alibi witness, is persons who can support their testimony, and so often times one alibi witness leads to another.

So, you know, we just are without anything but pure speculation as to what a proper investigation had been done as to the alibi witness and using that in the first stage, what that could have led to if there had been proper investigation.

I still think it is important for it to be shown, and I think there are cases upon this, and they are cited in the briefs, that despite the convictions that a family member could have been cross-examined on by the state, to just show that there is someone out there that cares about this defendant, and that even inspite of knowing about these convictions, is important, in this case, we have nothing to show that anyone whatsoever cares about this defendant to put on in the second stage.

Not even the defense attorney, because he

gets up and as set out in the briefs, sets himself we feel aside from the appellant, the defendant in that case, saying that he won't object to the finding of the guilt or not even to the death penalty if they should oppose it. And, therefore, you know, that's emphasizing that point. And perhaps witnesses, the family who was present, if they had known what they could have put on, what they were willing -- or would have been willing to testify to, there may have been some consideration by the jury that maybe this man ought to live, maybe there is some hope.

I realize that flies in the face of their position, and the number of aggravating circumstances, but I think that certainly has to be weighed, because in this case we have no mitigating evidence.

The factors that were stated as to the trial attorneys success in the matters that he presented, I would ask the court in looking at the record to notice that all of those involve cross-examination. Now cross-examination comes about from the state's witnesses as to their testimony, and at the same time the trial counsel had the appellant sitting at his side able to assist him to cross

examine those witnesses as to those factors.

Where he puts on, in essence, no defense, he makes no opening statement in either stage, and no closing statement even in the second stage, I don't believe the jury is left with much choice as to the status that this appellant stands in with regard to his trial counsel.

Now moving to the Grigsby matter, I think there are several things that we have got to consider on what we are looking for in this as with any jury, is that impartial jury, that jury that can impartially weigh the facts and make decisions.

Under cross-examination as stated in the Grigsby case, the state was unable to defeat the positions of their studies and their expert testimony. I think this is one thing that makes the Grigsby case especially strong from that standpoint.

Not only the studies from the previous cases were presented, but testimony was presented and those experts were cross-examined as to that testimony and those studies.

The state presented nothing in opposition to those studies.

CHIEF JUDGE HOLLOWAY: I suppose, though, that the test case, and our en banc opinion

there by cognizable groups, this is a somewhat novel cognizable group, distinct from others that we have been accustomed to dealing with, is it not?

MR. MUNSON: Yes, I would have no problem with agreeing with that to an extent.

CHIEF JUDGE HOLLOWAY: In fact, I don't know of any that are quite like this one. If we are going into cognizable groups of this sort we may have quite a number of others develop.

MR. MUNSON: I am not saying that that won't happen, because as law has developed over the years, new factors come into play in anything, you can see the development of search and seizure and what has gone through, you know, since the Miranda decision.

So I'm not saying that that won't come about. But that does not mean that those things should not be considered if they do have a valid basis. I think rightly so there should be. And you may think that I or trial counsel or this court sitting here en banc today may not have thought of at this point, that by scientific study and research may be proven to be a fact. I don't think we just laugh at scientific study. I think we have to give it its dues and its consideration, and I think

that's what happened in the Grigsby case.

Now as was pointed up I believe just on a comment here earlier, we are looking at a jury that if we use this portion that we call Witherspoon excludables, on the guilt stage, we are getting into the conviction-prone area. And that's saying that if these persons sit in the first stage, that they are more likely to convict, as well as impose the death penalty.

Part of this is because they have been qualified and that has been enforced upon them from the very beginning of their being called as a juror.

I think the studies, and that is what the court relied upon for this showing of conviction-proneness, therefore, has to relate to the first stage and not just the second stage, and that may be a problem with putting those excludables on an alternate panel for selection later on. Because the harm may have already occurred by the fact that these studies shows that those persons are conviction-prone, therefore, we are faced with that before we bring these excludables back into play.

So I think that has to be --

JUDGE SEYMOUR: Isn't the theory that you would put the excludables on in the conviction

stage and take them off in the penalty stage?

MR. MUNSON: Yes. Yes. Excuse me if I have quoted that wrong. But that is the case. And that I feel would give us or lend more towards this impartial jury composed of a cross section of the community because they would be included in that phase of it.

Now I want to call one final comment here. In regard to the voir dire of the jury in the Coleman case, the counsel for the defendant in that matter, Mr. Coleman, did not voir dire those jurors that were excused. That was done upon the court's questioning and the court summarily dismissing those jurors.

The record, the transcript will show that, and we have set it forth in the appendix also, the full testimony of those. That that was done upon the court's questioning of the jurors, and not any voir dire by the defendant's counsel.

JUDGE SEYMOUR: That is bad if the jurors fairly clearly say they couldn't impose the death penalty?

MR. MUNSON: I think any defendant's counsel should be given an opportunity to question as to that, and I particularly point it out in our

reply brief. The reason I say that is because I feel a wrong statement of the law was given, and when they just talked about the death penalty, and didn't leave the jurors with the option of excluding life imprisonment or the death penalty, and on voir dire by counsel, he could have questioned and corrected and found out.

Now if you are faced with the situation where you have a choice, where you are not absolutely frozen in to having to give the death penalty and nothing else, would your answer be the same?

And that opportunity was not presented at all. I think there are some rehabilitative efforts towards clarification of a juror's position as to the death penalty, that could have been done by counsel being allowed to voir dire. But they were summarily dismissed by the court, and then the objection made by the trial counsel to that.

CHIEF JUDGE HOLLOWAY: There was no effort by Mr. Pearson to ask for permission to rehabilitate them?

MR. MUNSON: No, there was not. He did ask on one juror, who was excused, but it was for a different reason, it was because that juror had talked with some other jurors, and he was denied

that opportunity, I am assuming from that, he felt he would be denied any opportunity at all.

Based upon the factors as we have set forth, including the matters of the Grigsby case, which I know are fairly recent, and we think get into very fundamental constitutional guarantees, which must be corrected if they are found to be incorrect, we feel the issues that we presented show that the matter has not been fairly, correctly handled by the court, and that the judgment should be reversed as a serious violation of the appellant's right, or at the very least, as to the ineffective assistance of counsel, that a full evidentiary hearing should be held, and the defendant, the appellant herein, allowed the opportunity to testify, to be present as to the ineffectiveness arguments that he personally feels, and certainly he would be the one who could relate to those.

And I might mention one other point, that there was some restriction even at the post-conviction relief hearing that was held of my cross-examination of Mr. Pearson, because of he and the court's consideration and concern about confidentiality between attorney and client. And that would not have been the case had my client been present.

For those reasons we would ask the court to give this due consideration.

JUDGE SEYMOUR: I have one more question.

MR. MUNSON: Yes.

JUDGE SEYMOUR: I would like you to address Judge Logan's question about the harmless issue question. Even if you agreed with the Grigsby court wouldn't it be harmless error not to have left those jurors on?

MR. MUNSON: In light of how the studies showed, the tendency towards conviction-proneness, of juries qualified in this manner, that because it only takes one juror not to find the person guilty, I think that very much cannot be then laid aside as harmless error.

JUDGE SEYMOUR: Does the harmless error standard apply? You concede that the harmless error standard applies?

MR. MUNSON: No, I don't believe it does. We are dealing with fundamental constitutional rights, the right to a trial by jury, by impartial jury, and I don't see that harmless error would ever apply to that selection of those persons who are going to be sitting in judgment as

to a human being and his life.

JUDGE SEYMOUR: All right.

MR. MUNSON: Thank you.

CHIEF JUDGE HOLLOWAY: The court appreciates the conscientious and able presentation in your briefs and your argument from both the petitioner and the state.

The case is submitted.

Counsel are excused.

And the court will be in recess until 9:00 o'clock tomorrow morning.

(Hearing proceedings adjourned 12:10 p.m., April 17, 1985.)

C E R T I F I C A T E

I, C. FREDERICK COLE, Official Court Reporter for the United States District Court for the District of Wyoming, do hereby certify that I reported by machine shorthand the proceedings contained herein on the subject hearing on the date hereinbefore set forth, and that the foregoing 76 pages, constitute a full, true and correct transcript.

Dated this 25th day of April, 1985.

C. FREDERICK COLE
Official Court Reporter

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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SUPREME COURT OF THE UNITED STATES

RONALD S. MONROE *v.* FRANK BLACKBURN, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-6667. Decided May 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

I would grant certiorari in this case to resolve the serious questions it raises concerning the scope of a defendant's rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), during the period following his conviction. While lower courts here have adhered to our precedents in finding petitioner's *Brady* rights to have been violated, the remedy ordered impermissibly dilutes those rights even as it recognizes them.

I

In 1980, after a previous conviction had been overturned, petitioner was brought to trial in New Orleans, once again charged with the 1978 murder of Lenora Collins, a neighbor. The state's case consisted of eyewitness identifications by the victim's two children, both of whom were present when the assailant broke into their mother's bedroom. *State* v. *Monroe*, 397 So. 2d 1258, 1268 (La. 1981). Accepting the testimony of the two children, who at the time of the murder were aged twelve and eleven, the jury rejected petitioner's alibi, found him guilty of first degree murder, and unanimously recommended the death sentence.

Six months after petitioner's conviction, but while his appeal was still pending, the New Orleans Police Department was contacted by Detective Joseph Gallardo of the Pontiac, Michigan Police Department. In the course of investigating

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one George Stinson's murder of his common-law wife in Michigan, Gallardo had received information suggesting that Stinson may also have murdered his previous wife, three years earlier in New Orleans. His previous wife was Lenora Collins, for whose murder petitioner has been sentenced to die. Two months later, Detective Gallardo again called the New Orleans police. This time, he related to Sergeant John McKenzie the substance of an interview he had had with Stinson's cellmate during which the cellmate had quoted Stinson as first confessing to the Michigan murder and then saying that "the same thing happened" to his first wife, Lenora Collins. Noting that a second source had corroborated this admission, Detective Gallardo also reported having received information that Stinson had threatened Lenora Collins' two children into identifying petitioner as their mother's killer.

All this information was carefully recorded by Sergeant McKenzie, who then dispatched his notes to the detectives who had been involved in the Collins investigation. These notes did not trigger further police inquiries. Neither was their existence ever disclosed to petitioner, who under Louisiana law, could have sought the remand of his case so that he might move in the trial court for a new trial. See *State* v. *Spell*, 388 So. 2d 754 (La. 1980). Indeed, it was not until late 1983 that independent investigation by petitioner's counsel led him to Detective Gallardo, who told of Stinson's incriminating admissions and of the fact that the New Orleans police had long before known of the new evidence. Petitioner thereupon filed a motion in New Orleans Criminal District Court seeking a new trial or, in the alternative, post-conviction relief, and also a stay of his execution, then scheduled for January 4, 1984. In this motion, petitioner claimed that the state had unconstitutionally suppressed material, exculpatory evidence. While petitioner was still unaware of the existence of Sergeant McKenzie's actual notes, his counsel's independent efforts in Pontiac enabled him to present the

Criminal District Court with all of the information contained in the notes.

The day before petitioner's scheduled date of execution, the Criminal District Court denied petitioner's motion without an evidentiary hearing. Weighing the eyewitness testimony of the victim's children against the affidavit of Stinson's cellmate, the court found that the new evidence was not "so material that it ought to produce a different result then [sic] the verdict reached." The Louisiana Supreme Court affirmed hours later, although two justices would have granted a stay and ordered a "full evidentiary hearing on the newly discovered evidence issue." The two noted: "Because the death penalty is so final, surely no harm would come from continuing this matter one month to allow the defense to produce witnesses from Michigan, and have the trial court evaluate this evidence."

After the state denied relief, the Federal District Court acted upon a habeas petition filed several days earlier, and stayed petitioner's execution. After a hearing in which he heard testimony from Detective Gallardo and Stinson, a magistrate held that the information allowed to sit undisturbed in New Orleans police files was both improperly suppressed and clearly favorable to petitioner. He recommended that the writ be granted.

The District Court adopted the magistrate's report, agreeing that the information received from Detective Gallardo was material, exculpatory information that under *United States* v. *Agurs*, 427 U. S. 97 (1976), should have been disclosed to petitioner. The District Court noted that, when coupled with the absence of physical evidence linking petitioner to the murder, the possibility that the eyewitness testimony of the victim's children may have been coerced, and testimony by petitioner's mother placing Stinson at the victim's house on the day of the murder, the suppressed evidence "makes the assertion that Stinson committed the murder plausible." Finding the evidence to "create a reasonable

doubt as to Monroe's guilt that did not previously exist," the court issued the writ. However, having concluded that petitioner's due process rights under *Brady* had been violated, the court did not order that he be released or retried. Rather, it ordered Louisiana

> to grant to Petitioner whatever he was entitled to by way of post-conviction relief during the limitation period provided by Louisiana law for a request for a new trial based on the exculpatory material which the State courts did not have an opportunity to consider, so that Petitioner may fully and effectively exercise and exhaust his post-conviction rights under Louisiana law.

The Court of Appeals upheld the District Court's choice of remedy. 748 F. 2d 958, 960 (CA5 1984).

II

In *Brady* v. *Maryland*, *supra*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. In *United States* v. *Agurs*, *supra*, we recognized that

> there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done."

Id., at 110–11. The message of *Brady* and its progeny is that a trial is not a mere "sporting event"; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory. See *United States* v. *Bagley*, —— U. S. ——, —— (1985) (*Brady* rule to "ensure that a miscarriage of justice does not occur").

The quest for truth may not terminate with a defendant's conviction. In Louisiana, a convicted defendant must receive a new trial whenever

> [n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

La. Code Crim. Proc. Ann., Art. 851(3) (West 1984). When the sovereign has decided that justice will be best served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose otherwise. And until fact-finding proceedings, or the possibility of them, is terminated, the state remains bound by the rules of simple fairness that *Brady* held to be of constitutional dimension. It would hardly make sense to hold the state to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the state to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings.[1]

In this case there can be no doubt that petitioner's due process rights were violated by the state's failure to disclose to him the information that Detective Gallardo related to the New Orleans police. That the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference. The police files that so readily provided

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[1] Because in this case, the state suppressed exculpatory evidence while petitioner could still have sought post-conviction relief under state law, we need not consider whether the state also deprived petitioner of a federal right to seek habeas relief on the basis of evidence that undermines the sufficiency of the evidence supporting his conviction. See *Dobbert* v. *Wainwright*, —— U. S. ——, —— (1984) (BRENNAN, J., dissenting from denial of stay and certiorari); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners*, 75 Yale L. J. 895, 958 n. 223 (1966).

the state with the incriminating material to convict a defendant cannot be turned into a dead-letter repository where evidence of innocence is concerned. See *Moore* v. *Illinois*, 408 U. S. 786, 810 (1972) (MARSHALL, J., concurring in part and dissenting in part); *Smith* v. *Florida*, 410 F. 2d 1349, 1351 (CA5 1969). If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

This is certainly not a case in which the failure, whether intentional or inadvertent, of the police to alert petitioner to the new information can be attributed to their failure to understand the complexities of the *Brady* rule. At the time the evidence was suppressed, *Agurs* obliged the state to disclose evidence that created "a reasonable doubt that did not otherwise exist" as to defendant's guilt. 427 U. S., at 112. And though the district court here quite properly made a careful examination of the transcripts from petitioner's second trial before holding the information from Detective Gallardo to be "material" under the *Agurs* standard,[2] I cannot believe that either an examination of the record or a law degree is needed to appreciate that admissions by a wife-killer incriminating himself in the murder of a former wife cannot be dismissed as idle gossip.

III

While it was correct to find a *Brady* violation, the District Court appears to have believed that because the Louisiana courts were not given an opportunity to consider the evidence that petitioner was able to develop in the course of his federal habeas proceeding—to wit, Sergeant McKenzie's actual notes of his conversations with Detective Gallardo and the testimony of Detective Gallardo at the habeas hearing—

[2] It is clear that this evidence would also be material under the standard established by this Court in *United States* v. *Bagley*, *supra*.

they should now be allowed to decide whether they were a bit hasty in denying petitioner's new trial motion on the eve of his execution. However, the only reason why the state courts never considered this evidence was that they dismissed petitioner's motion without an evidentiary hearing. It was only after the Federal District Court gave petitioner the chance to subpoena the evidence that it came to light. Moreover, as the Court of Appeals observed, the state courts were presented with the "same underlying information" as that contained in Sergeant McKenzie's notes. Having adequately asserted in state courts the basis for his *Brady* claim, petitioner plainly satisfied the exhaustion requirement of federal habeas corpus.

Sending petitioner back to state court with his already exhausted claim is particularly inappropriate here because of the nature of the constitutional violation. If the police had not improperly suppressed the exculpatory information, petitioner would have been able to seek a new trial under Art. 851(3). To require petitioner now to pursue this same remedy is thus to treat the suppressed information just as if it had been "found in a neutral source" and therefore to ignore the "special significance" of the police's obligation to serve the cause of justice. *United States* v. *Agurs*, *supra*, at 111. The remedy ordered here removes from the State any incentive to make timely disclosure of material, exculpatory evidence and trivializes the constitutional right recognized in *Brady* and its progeny. The only way this right can be guaranteed is to grant petitioner the remedy that until now has always followed a determination that the *Brady* rule has been violated: He must released or retried. Because I do not believe this Court should stand by in the face of the dilution of the due process rights of an individual who may not even be guilty of the crime for which he stands under death sentence, I respectfully dissent from the denial of certiorari.